

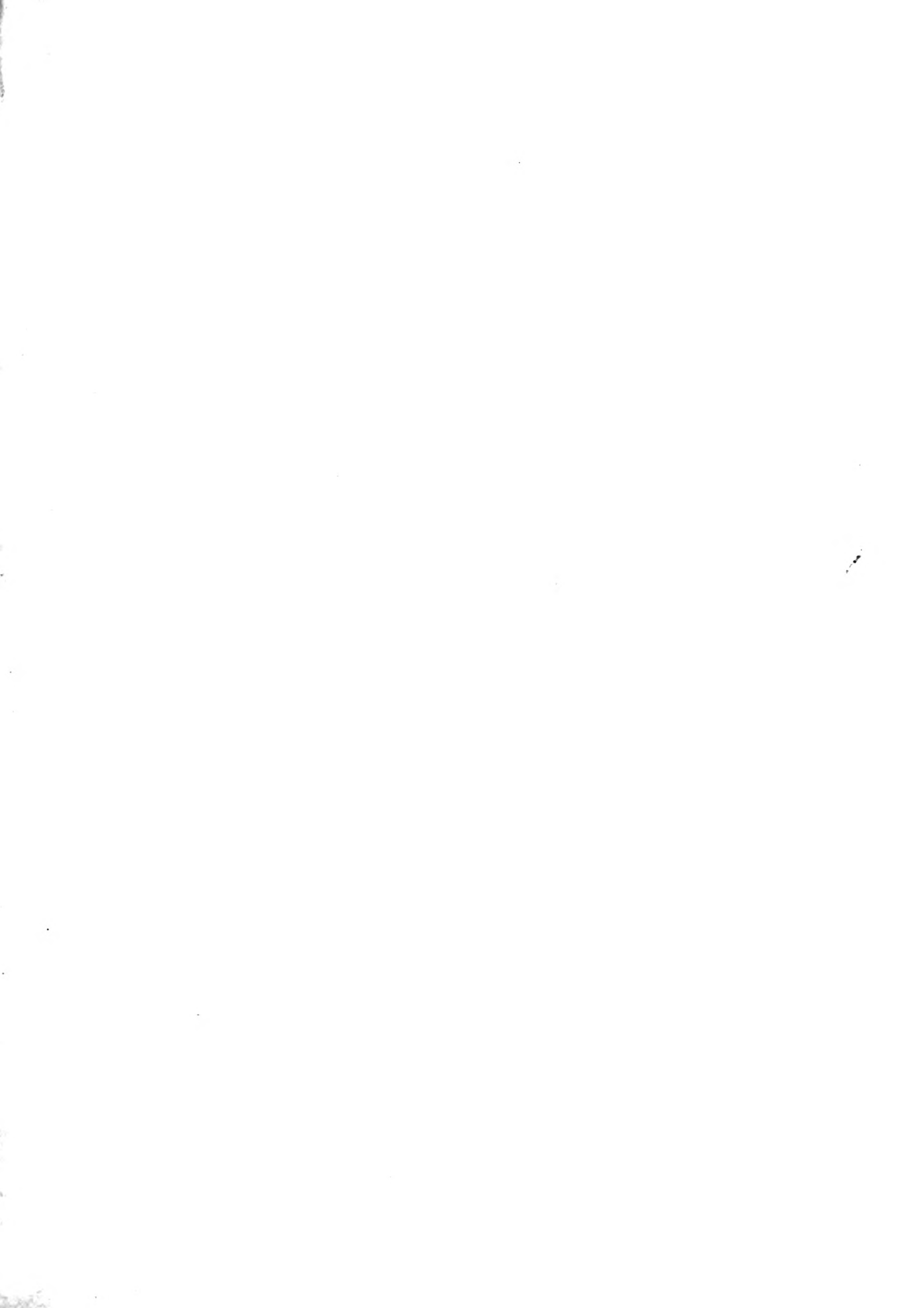
D  
0  
0  
0  
9  
1  
8  
1  
9  
9  
1



UNIVERSITY  
OF CALIFORNIA  
LOS ANGELES

SCHOOL OF LAW  
LIBRARY











## Index of Volume.

- I. Equity Jurisprudence Jr. Prof. Hutchins (Index)
- II Equity Jurisprudence Sr. Prof. Hutchins (Index)
- III. Equity Pleading + Practice Prof. Thompson (Index)
- IV. Torts (Outlines etc) Prof. Wilgus
- V. The Function of the Financier in Industry. Mr. Greene.
- VI. Quasi - Contracts. Prof. Knowlton.
- VII. Criminal Law Prof. Knowlton. (Index)



LECTURES

ON

EQUITY JURISPRUDENCE. JP.

BY

PROF. A. E. HUTCHINS, LL.D.

-----

Reported by C.G. McCollom.

-----

UNIVERSITY OF MICHIGAN.

Law Class of 1904.

-----

Edwards Bros.----- Publishers.

Ann Arbor, Mich.

1902--1903.

1010

1010

1010

1010

1010



--o--

Before entering upon the subject of Equity Jurisprudence, it might be well to note briefly something touching upon the Bibliography of the subject, as an aid to the understanding of the books which we will come in contact during this course.

## BIBLIOGRAPHY.

There are several excellent works upon the subject of Equity. We have a very good work that was regarded as standard and is still considered standard as a literary work and as a Classic. That work is Story's Equity Jurisprudence, written by Judge Story, as you all know, a book which I as a student liked very much to read, for it had nothing in it that repelled, on the other hand it had every thing that attracts the student. As a practical book it is not so good as some books that have been written later, but from a literary standpoint Story's Equity Jurisprudence is considered the standard. Pomeroy's Work on Equity is now considered the standard as a practical book on this subject in this country. This work was written by Professor Pomeroy at the time that he was professor in the University of California. It is written in three volumes and is the most exhaustive work that has ever been written on this subject.

There are several other works that may be read to advantage by Law Students:

Eaton on Equity.

Adam's Equity, a book written from the English point of view.



Bispham on Equity, a good book for students, in one volume.

Lawson's American Edition of Snell's Equity Jurisprudence.

Rigelow on Equity, a good book but very brief.

Beech on Modern Equity is found in the libraries of the profession and contains a large amount of cases and it is sometimes very easy to get a line on a number of cases, but it is not considered authoritative by the courts.

The older writers, that is Story and those who wrote on the subject in his time, considered and treated the subject from an entirely different standpoint from that taken by modern writers, giving to the question of jurisdiction much greater prominence than it now occupies. This is on account of the fact that codes have been passed in many jurisdictions, which do away, to a great extent, with the old differences between Common Law and Equity Pleading and giving concurrent jurisdiction in many matters where previous to the passage of these acts the matters of jurisdiction was of great importance.

In several states we have separate Courts of Equity apart and distinct from the Common Law Courts, but the tendency is to do away with the separate Equity Tribunals in the different States.

We have also separate Equity Reports in some States as in New York, New Jersey and some of the Southern States.



It is essential that the student in order to know what Equity is, must know something of what Equity has been, and I am sure, the student should have, at least, a general knowledge of its origin and its sources, it is not my purpose to give a detailed account of this but a general outline.

In order to ascertain its source we must examine the early system by which Justice was dispensed.

FIRST, AS TO THE ANGLO SAXON PERIOD; During the Anglo Saxon Period there was nothing like a Court of Equity.

The Policy of the Anglo Saxon Period was one of DECENTRALIZATION.

During the Saxon Period Justice was Administered very largely through the medium of Local Courts, known as Folk Courts, there was also a National Assembly known as the Assembly of the Wise, they had a Judicial Function but these were rarely exercised. The policy of the Anglo Saxon Period was one of decentralization. The purpose of the System was to Administer Justice at the DOOR OF THE SUBJECT. But in this system we find nothing like a court of equity. It is probable, however, that Equity was administered during that period to a greater or less extent through the medium of these Local Tribunals. They were presided over by Non-Professional Judges and as Equity is Simply Natural Justice it is probable that Equity was frequently administered by them.



STCOIT, THE PERIOD OF WILLIAM THE CONQUEROR; Now this was the status during the Anglo Saxon Period, the Anglo Saxon Period was followed by the Period of William the Conqueror.

William in setting up his system of Jurisprudence did not interfere with the Anglo Saxon Local or Folk Courts, they were left in existence; he created the King's Court or the Chief Justiciar, which at this time, embraced the judicial, legislative and executive functions, this was the creation of the FIRST JUDICIAL OFFICE IN ENGLISH JURISPRUDENCE.

Another important act of William was the creation of the office of Itinerant Justices. The duty of these Justices was to go from County to County and hold Courts. Their office however was temporary.

The Policy of William the Conqueror was one of CENTRALIZATION, just opposite to that followed by the Saxons.

He did not destroy the Saxon Courts, but by opening to the People the Judicial Authority of the Crown he inaugurated a policy that gradually drew them away from these local courts.

While these local Saxon Courts continued to exist through several succeeding Reigns they gradually fell into disuse, the King's Court and other courts taking their place.

During the Reign of Henry II the Judicial Functions of the King's Court was separate from the Administrative and the Legislative Functions and from that time until its abolishment it was





its abolishment it was known as the Court of the King's Bench.

During this same Reign the Office of Itinerant Justices was made a permanent one, later the Justices of the Superior Courts performed the functions of these itinerant justices.

-----oOo-----



5. THE FIRST SUPERIOR COURT OF THE KING. JR. 3  
THE COMMON PLEAS II.

Now if these early days the King's Court was attached to the person of the sovereign. It was wherever the King happened to be. This being inconvenient to suitors the difficulty was remedied by a provision in the Magna Charta to the effect that the Common Pleas should no longer follow the Crown.

In obedience to this a new Court was created known as the Common Bench or Common Pleas and its location was fixed at Westminster. It had jurisdiction in controversies concerning land and other matters that were purely civil. This Court which had its origin from the Magna Charta came to be a Court of great importance in England, and its jurisdiction was extended to a large number of cases and it was a court of first resort in all cases between subjects where the action was not criminal or quasi-criminal in its nature, where a public right or duty was involved the case had to be tried in the King's Court.

THE THIRD SUPERIOR LAW COURT was called the COURT OF EXCHEQUER. It originated during the reign of William the Conqueror. He created a Board of High Officials whose duty it was to superintend the Royal Revenue. The Chief Justiciar and the principal Barons were required to attend sittings of this board in order to decide questions of a legal nature, these officers constituted the legal branch of the Board. This Judicial Branch gradually grew to be a Court known as the Court of the Exchequer. By the use of fictions the jurisdiction of this court was extended



until it came to be concurrent with that of the other superior courts.

Now I have briefly sketched an outline of the origin of these Superior Courts in England. These Courts continued to exist until the Judicature Act of 1873, by that act they were united into one Superior Court of Judicature.

Now this was the machine for administering justice in England in the law courts. And for a succession of centuries, side by side with these superior law courts we find that Courts of Chancery existed in England, the terms Equity and Chancery being synonymous. The system of law administered in this court is called equity, so at present we have two distinct branches of legal procedure, the legal and equitable.

For nearly Six Centuries a court called the Court of Equity or Court of Chancery has existed in connection with these common law courts.

To an ordinary mind this dual method of procedure seems unnecessary. It is difficult for an ordinary person to see why if he wishes to get damages for a breach of contract he must go before one tribunal and if he desires the specific performance of the same contract he must appeal to a court of equity. The reason for this dual nature will appear as we proceed farther with the subject of the origin and progress of equity. There is no real reason why we should have this dual method of procedure at the present time and in many states it has been done away with. But at the time of its creation in England there were powerful influences at work which seemed to make a separate court necessary.



Of course, in primitive civilization, the legal processes are simple, and based upon natural or inherent justice. In the time of the Romans, they drew their law from the laws of nations, and the laws of nature; and upon their ideas of right, duty, justice, morality and good character, they built a code of legal principles, which they applied in all cases that came before them, modifying the strict rule to suit the particular case, in each instance. The result of this was a simplicity and symmetry of procedure that under the American or English system of procedure cannot be attained. It seems strange that England should have refused to adopt a code of laws which have formed the basis of the Law of Continental Europe and found it necessary to form a separate court to apply the equitable principles.

After the establishment of the common law courts in England the law began to formulate itself into judicial precedents. This was done by the Judges stating the principles upon which he acted. The law at this time consisted chiefly of customs and upon the introduction of Judicial precedents it began to assume form and finally became the common law of England. There is, however, a great amount of Roman Law in the Common Law as laid down in those times. The Judges did not create new remedies. The early judges were to a great extent the Ecclesiastics, who naturally drew their learning from Rome. Besides, there is much internal evidence that our common law in its early stages was greatly influenced by Roman Jurisprudence. Had it not been for several great causes working against it, the common Law of England would have been formed more upon the Equitable Roman principle.

We must go to the Roman for the most of our fundamental doctrines of equity.

THE GREAT SOURCE OF EQUITY is found in the ROMAN LAW. Therefore it is a good idea for a student to know something of Roman Jurisprudence.

We will now consider the causes that lead to the establishment of a Separate System of Equity in England.

In the early days the common law judges did not give the reasons which guided them in giving their decisions, they simply found for the plaintiff or defendant, as the case might be. But they soon began to write out their reasons which led them to give their decisions as they did. And also to give their opinions on matters of law that arose and these opinions were filed with the case and there soon came to be a large collection. Later these decisions were printed and used as precedents.

I don't want you to get an erroneous idea in regard to the use of precedents. There is a vast difference between the use of precedents to-day and their use in the early times, for they came to follow precedent so closely





## II. EQUITY JURISPRUDENCE. JR. 6.

that a decision would not be given unless an exactly similar precedent could be found. If a new combination of facts came up with regard to the application of some principal of equity they would not apply it. And the result was that the people demanded that there should be some Court where these principals could be applied.

The judges of the present time are not bound to the letter of the precedent as in the early days but use them as a guide, not hesitating to decide contrary to them if the necessity of the case demands that they should.

THE FIRST CAUSE, leading to the establishment of the dual system of administering justice in England is due to the Slavish Adherence of the Common Law Judges to Precedent.

There is another book that I forgot to mention in the preceding lecture, that is Spence on Equitable Jurisdiction.

(Extract read from Spence, cited below)  
Pomeroy's Equity Jurisprudence, Par. 16.  
Spence's Equitable Jurisdiction, Vol.  
I, pp. 321-2.

You are not to understand from what I have said, that with the progress of the English people there has been no progress in the Common Law. Later, a more liberal spirit characterized the Judges, beginning with Lord Mansfield. So great has been the change that the Common Law of to-day, as administered by our Courts has come to be an admirably constructed system.

THE SECOND CAUSE, is found in the fact that there is nothing in common between the dogmas of Feudalism and the Principles of the Roman Law. Feudalism was the basis of the English Law of Real Property and the personal status of the subject was governed very largely by feudalism. While Equitable principles were derived from Roman Jurisprudence. It was thought by English Jurist that the two could not be enforced by the same tribunal. This was probably an erroneous conclusion for on the European Continent, whose Laws were founded upon the Roman or Civil Law, the two were enforced by the same tribunal.

During the reign of Edward III., from 1327 to 1377, events took place which was one of the causes to which I refer. At this time the Court of Equity had already been established but it was in its infancy. In this reign an event took place which was to give to the Jurisdiction of the Court of Equity a tremendous impetus. This event was the refusal of Edward with the consent and support of his parliament to pay the tribute demanded by the Pope at Rome. This tribute to the Pope had always been paid by Edward's predecessors from William the Conqueror down. Whatever was connected with the Papacy became distasteful to the people



and the Roman Law did not escape, it being regarded as an instrument of Papal authority. The citation was prohibited in the Common Law Courts, the result of this was to extend the jurisdiction of the court of equity, which previous to that time has been limited and of little account

IN THE PECULIAR PROCEDURE OF THE COMMON LAW COURTS, we find another reason for the establishment of a separate Equity Tribunal. It was necessary before bringing an action, to obtain a writ issued in the name of the King, allowing the action to be brought. The Common Law Courts furnished a fixed number of these writs, whose form was always the same. New ones could not be added; old ones could not be changed to meet new conditions. There were not only different forms of actions but each form was sub-divided with reference to the facts which could constitute a ground for an action. If a person could find a writ that exactly suit his case, then he could have relief, otherwise he was without any recourse except through the intervention of the crown. These writs were kept in an office or department known as Chancery. These writs were drawn up by the Clerks of the Chancery Court but the judges decided whether the writs were proper and if they decided that the writs were not proper the plaintiff was thrown out of court. You can readily see from what I have said that the system of procedure of the Common Law Courts and the Remedies furnished were meagre in the extreme. There were a certain number of forms and if your case fitted any of them, well and good, and if it did not you were without remedy, that was the situation.

But one of the chief defects of the Common Law system was, that it furnished no scheme for the adaption of relief for the changing rights and duties of men. A Common Law Judgment was either for or against the plaintiff, it might be for the recovery of a sum of money, of the recovery of the possession of a specific chattel or the recovery of the possession of certain land, it could go no farther. A Common Law Judgment is simply a finding in favor of plaintiff or for the defendant, that was the only judgment it could enter. It could not adapt itself to the changing and reciprocal duties of mankind. It may be equitable that plaintiff have a judgment if he does what is equitable to defendant, that the court should enter up a conditional judgment equitable and just according to the situation of the parties but the common law courts had no authority to do that, but equity on the other hand could adapt its judgment to the circumstances and needs of the parties.



## Lecture III.

In my last lecture I was explaining some of the reasons which seemed to make the establishment of a separate Equity Tribunal a necessity in England. I spoke of the fact that the Common Law Judges became slaves to legal precedents as one of the reasons. As a second reason, the fact that the rules concerning the legal status of the person and the rules and principles governing real property were antagonistic and were deemed not to be enforceable in the same tribunal. The rules concerning real property are of feudal origin. The rules and doctrines of Equity coming from the Roman Law had nothing in common with the feudal system. Another reason I gave as a cause, or rather as a cause of broadening the extent of the Jurisdiction of the Equity Court which had already been established in England, was the refusal of the Crown with the support of Parliament to longer pay the tribute demanded by Rome. As the Roman Law was the source of Equity Jurisdiction everything that pertained to it became unpopular. The Roman Law did not escape. The Citation in Court was prohibited by the Common Law Judges. So the situation demanded the establishment of another court where the principles and doctrines of equity could be enforced. The fourth reason may be found in the peculiar Procedure of the Common Law Courts. It was necessary before bringing an action, to obtain a writ issued out of Chancery in the name of the King allowing the action to be brought. This is known as a summons at the present day, and is for the purpose of bringing the defendant into court. The number and form of these writs were fixed and certain. Not only the form of the writ was fixed but the state of facts which made up the action which could be brought under the different forms of writs were established. So the different ways by which a suitor could get into court was limited, on the Common law side and if an extraordinary case arose and the plaintiff was unable to find a form of writ to fit his case, then he was without remedy, except that he appealed to the mercy of the Crown. It must appear to you from the suggestions that I have made that the system of remedy furnished by the Common Law Courts were inadequate and unsuited to the needs of the people. It furnished no scheme for the adaption of relief for the changing rights and duties of mankind. A Common Law Judgment might be for the recovery of the possession of certain land, for the recovery of a specific chattel, but it could go no further. It could not nor can it to-day enforce the performance of a duty. The Common Law Judgment could reach property but it could not make litigants do what in Equity and good conscience they ought to do. Such a judgment cannot always do justice between the parties. There may be duties which one of the parties should before to the other before he is entitled to relief sought. He may be entitled to relief but only on his performance of a duty towards the other party. In brief the Common Law Court did not, and do not now have authority to enter up a conditional Judgment, the judgment must be absolute, either for or against the plaintiff or defendant. Now a condition or a provision



introduced into a judgment can only come in the form of a decree in Equity. The Equitable Decrees are so flexible that they can be adapted to meet the needs, and the changing rights and duties of litigants.

One of the chief defects in the early Common Law Procedure lay in the fact that it could not adapt itself to the changing rights of litigants. The Common Law Judgment must be either for the plaintiff or defendant. It must be for a sum of money or for the possession or delivery of property. It can never make the litigant do what it is his duty to do. The Common Law Court has no authority to enter a conditional Judgment or decree. This can only be done by a court having Equity Power.

As a rule the Common Law Court proceeds upon the theory that the defendant is not going to do his duty and has not done it. The decree in equity on the other hand makes all the parties to the controversy do what in equity and good conscience they should do. The Common Law Judgment is arbitrary and fixed. I should state that the Common Law method of procedure was so unsuited to the demands of litigants that in the Reign of Edward I a statute was passed which attempted to remove the difficulty. This statute provided that the Clerks of the Court of Chancery might make new writs. This apparently paved the way for an elastic method of procedure, but the Common Law Judges were hostile to the change, and they often refused to recognize and threw out the new writs drawn up by the Clerks of Chancery. This statute only resulted in the making of three additional legal remedies or forms of actions, namely, trespass on the case, and its offshoots, trover and assumpsit. These are often called the Equitable Remedies of the Law on account of their liberality. It was through these actions that the principles of equity began to react upon the Common Law Courts.

The situation became so grave that an attempted reform was made through an act of Parliament during the Reign of Edward the I. which conferred large powers upon the Chancery Clerks in regard to framing of new writs. The Act however, was very strictly construed by the Common Law Judges, who were at once hostile to it and it failed very largely in its purpose. Out of it, however, there sprang three new causes of action which have been of great influence in liberalizing the law, namely, trover, Assumpsit, and Trespass on the Case, the first two being offshoots of the last. These are known as the Equitable Actions of the Law.

Pomeroy's Equity Jurisprudence, Vol. I, par. 34-39.

I have now given you an outline of the early system that existed in England for the enforcement of justice. I have explained to you the reasons for the establishment of a separate Equity Tribunal. We are now prepared, having in mind the Common Law System, to examine into the Origin of Equity





### III. EQUITY JURISPRUDENCE. JR.

2

Jurisprudence. Let us see how Equity arose.

THE EARLY NORMAN KINGS, were assisted in their Judicial functions by a Council known as the Minor or Select Council. It was composed of certain high officials, and such other persons as the King might chose, the Chief Treasurer, the Chief Justicar were members of this council. This Council is to be distinguished from the Great Council, although it formed part of it when the Great Council was in session. It came to be the custom for a suitor who could not get relief from the Common Law Court to throw himself on the grace or mercy of the Sovereign sitting in Council. In theory the sovereign is the source of all justice or judicial power. This power, however, he could delegate. He delegated parts of it to the Common Law Tribunals. In theory equitable relief came from the judicial power still held in reserve by the sovereign. When this application for relief came to be more frequent, it was the custom of the King to refer them to the members of the Select Council. The most frequent references of this kind were made to the Keeper of the Great Seal who was called the Chancellor. He was the Secretary to the King, the nearest to him in all matters of state and is sometimes said to be the Keeper of the King's Conscience. He was usually an Ecclesiastic, and therefore learned in the Roman law. This delegation of authority, at first occasionally, came after a time to be practically constant. In the twenty second year of the reign of Edward III. a royal writ or decree was issued directed to the Sheriffs of London, directing that all matters that were of grace should be prosecuted before the Chancellor. The beginning of the Court of Equity is usually dated from this decree, and is then said to have taken its origin as a distinct tribunal. Application to the Court was made by a bill. In early times the application or petition was undoubtedly oral. After the court was fully established as a separate tribunal the application was in writing. After the filing of the bill in the proper office, a subpoena was issued to the defendant and commanding him to appear and answer the bill of complaint. The subpoena is said to have been invented by John De Waltham who the keeper of the Great Seal during the reign of Richard II from 1377 to 1399.

In seeking for the origin of the Court of Equity in the English Law we must look to the select Council by which the early Norman Kings were aided in the performance of their Public Functions. This council consisted of the Chief Justicar and the Treasurer and other high officials considered of especial importance by the crown. According to the English Theory the Crown is the source of all Judicial Power, but this power may be delegated. By means of this delegation the power of the common law courts was created. In theory, however, the Judicial Prerogatives of the Crown were not thus all exhausted. So it came to be the custom for suitors who could not find relief in the Common Law Courts to appeal directly to the Crown for a remedy.



In deciding these cases, the crown, in theory, drew upon this reserve Judicial Power. After a time it becoming impossible for the Crown personally to decide all such cases, reference of these cases were made to the members of the Council, particularly to the Chancellor. He was nearest to the person of the Sovereign, being his secretary and advisor. What was at first occasional became in a short time to be permanent. And in the twenty second year of the reign of Edward III there was a Royal direction that all matters of Grace should be prosecuted before the Chancellor. This time is usually spoken of as the time of the origin of the Equity Court, the 22nd year of the Reign of Edward III.

Now the delegation of authority by the Crown to the Common Law Courts was very different from the authority conferred on the Equity Courts. In the Common Law Courts it was delegated in each particular case. This authority was conferred in the time of Edward III upon the Chancellor in all matter of grace, was different in this that it gave to him general jurisdiction in all those matters. This distinction which was a fundamental one in England has no existence with us. In this country Courts of Law and Equity derive their authority from Constitutions or statutes. But under the English system it was delegated in each particular case in the Common Law Courts. But the delegation to the Chancellor was general in all matters of grace. At the time of this decree suits in equity were prosecuted by presentment of a Bill or Petition in which the cause of Complaint was set out. Process in Equity is the Subpoena. This subpoena commands the defendant to appear and answer plaintiff and abide by the order of the Court. In Equity the King would not order any process until he had heard plaintiff. In the Common Law Courts the course was different. The Crown delegated its authority in each particular case by means of the original writs and the writ issued first to bring the defendant into court, then the plaintiff stated his cause of action in his Bill or Declaration. In Equity the bill is filed first and then process issues.

I have used one or two terms I want to explain; On the Law side of the case the party prosecuting the action is usually spoken of as the Plaintiff and the other party as the Defendant. On the Equity side of the Court the party taking the initiative is called the Complainant and the other party is known as the defendant, and in some states the respondent. In some states the distinction has been abolished, that is so in the United States Courts. But in some states you will find this difference I have explained. In Equity the complainant files his bill before any process issues, then the subpoena is issued. I may say that this method has been adopted in many of the Code States on the Law side of the Court.



While the account I have given you about the origin of Equity is probably correct, it is not the one you will find in all text books. I have followed Spence, Pomeroy and Kirley. And I think that this one is supported by good authority and it will be the one we will follow.

A large part of the jurisdiction of the Court of Equity in the early years had to do with matters of trusts. A Trust is where one party has the rights to the benefits of a property while the legal title is in another. These matters were and are strictly within the scope of Equity Jurisprudence. Bispham gives a large number of cases, taken from the old Court Calendar showing the extent of the Equity Jurisdiction during the reign of Edward III through the Reign of Henry VIII. In examining these cases we become aware of the fact that many of the principles of equity which are in force to-day were recognized during the formative period of the Court of Equity.

The jurisdiction of the Court of Equity in these early days was in substance the same as it is to-day. In some respects its jurisdiction was broader than it is to-day. The same spirit characterized the Court of Equity then that characterizes it to-day, namely the spirit that prompts the Court to supply the deficiencies of the law, and to make suitors do what in equity and good conscience they ought to do.

As you have seen the necessities of the situation gave rise to this separate jurisdiction in England. It was not a usurpation of the rights of the Common Law Courts, but a necessity created by the demand of the people for a tribunal where these equitable principles might be administered through the application of these doctrines where the Common Law Courts utterly failed to give adequate relief. During this early period we find many cases in which the Court of Equity would take up the petition of a poor man in some action against a wealthy one, where he could not have been heard at law on account of the expense attached.

In the early History of the Court of Equity it was governed by substantially the same principles that govern it to-day. One of the most important of these principles is found in the fact that Equity always strives to supplement defects in legal remedies. And the jurisdiction of the Equity Court during the Formative period was in some respects broader than it is to-day, although in its essential features it has always been the same.

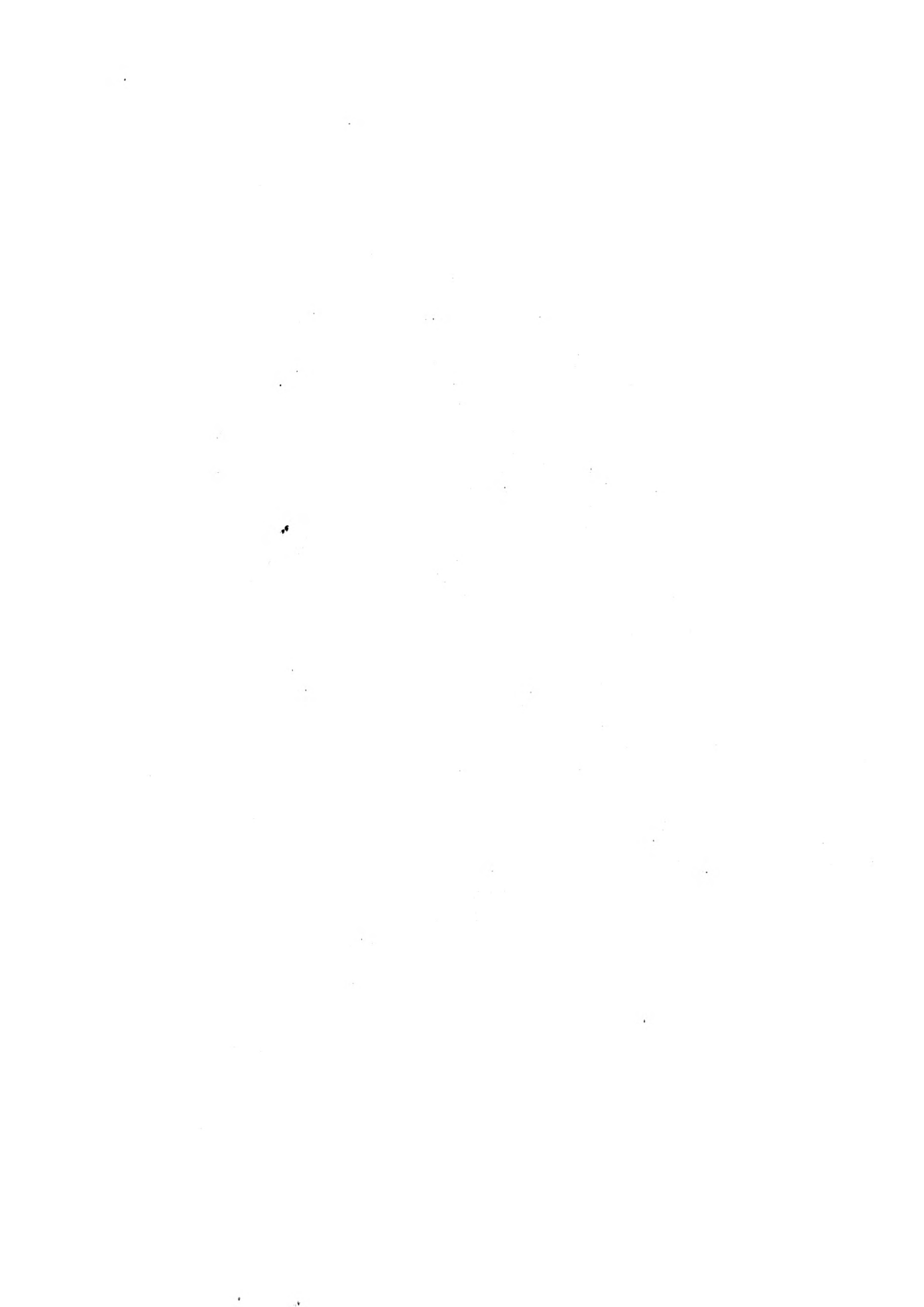
Bispham's Principles of Equity, Par. 8.  
Pomeroy's Equity, Vol. I. Par. 36.



## Lecture IV.

I suggested to you in my last lecture as one of the reasons necessitating a separate Court of Equity, the fact that the procedure and process of the Courts of Law were meagre and inelastic in the extreme. I would suggest that on the other hand that the procedure of the Court of Equity has always shown a tendency to extend its jurisdiction instead of being contracted and meagre. That is to say, that in a Court of Equity you could always accomplish results that would be impossible in a court of law or example the Court of Equity has always exercised the right to probe the conscience of the parties to the controversy. Under the old system of evidence, it was impossible to swear a party to the controversy. You could not make out your case, if you were appearing for the plaintiff, by placing the plaintiff on the stand and swearing him, it was thought that parties interested in the result of the suit could not or would not tell the truth and so the law said that he was not competent to testify. Or if your case lay within the knowledge of the defendant you could not put the defendant upon the stand and swear him because the law said that he was an interested party and was not a competent witness. The Court of Equity, however, has always exercised the right to bring the parties to the suit and probe their conscience as to the facts of the case in issue, and the party was obliged to answer under penalty for contempt of Court. If you needed the testimony of a party to a Common Law suit, you would have to sue out a bill in equity, and force him under penalty for contempt to answer the questions wanted, and then his answers could be used in evidence to prove or establish his case in the Common Law Court. The bill was very frequently used to get testimony that it was impossible to get by strict legal procedure. The bill in equity for that purpose is no longer needed, for this defect in the method of getting the evidence of interested parties, has been remedied by legislation. You may put an interested party upon the stand and swear him and take his testimony in regard to the case; his being an interested party does not render him an incompetent witness, it only goes to effect his credibility. But very frequently it becomes necessary to file a bill of discovery in equity in order to probe the conscience of a party to the suit in order to make out the complainant's case.

There was another advantage equity procedure had over the common law procedure, I refer to the power to issue preventative remedies. As I have already suggested the Common Law Courts proceed upon the theory that the defendant is not going to do his duty and that he has not done his duty, the common law judgment gives damages but cannot force the defendant to do his duty. It cannot prevent him doing what would be against his duty and against good conscience.





The Court of law has no power of issuing the writ of injunction. The Court of Equity has always had that power, and has to-day. You will remember that the Court of Equity is extending its jurisdiction on account of its power to restrain a party from doing or threatening to an injury to another. Government by Injunction is a familiar phrase to us at the present day.

There was another thing that a court of law could not do, that is compell the performance of a duty or obligation. A contract is entered into for the sale or purchase of land between two parties. At Common law if one of the parties fails to carry out his part of the contract all the other party can do is to sue for damages for the breach of the contract. He may not want damages. He may desire the land for a particular purpose, a residence, or for business purposes, and desires that particular piece of property, but all the remedy the law affords is a suit for damages. But on the equity side of the court, however, he may compel the other party to perform his part of the contract. He may compel him to do what in equity and good conscience he ought to do. I will not go into details and explain how the decree in equity is enforced, but I will simply suggest that it was accomplished by a certain compulsory process. First by a writ of attachment the defendant was brought into court, if he had not performed the decree he had to purge himself for contempt and if he failed to do so he was put into prison until he performed the decree of the Court. If he remained contumacious the court was powerless; if he wanted to stay in jail or prison all his life rather than perform the decree of the court there was no other recourse against him. To remedy this defect in modern times in most of our states passed, and I think in all of them, which provides that a decree in equity directing the defendant to convey lands shall be self executing, that is to say, if the defendant does not of his own free will carry out the order of the court shall stand as and for a conveyance, as and for the execution of the contract. There is a statute of that kind in this state. In other states you will find statutes which provide that under certain circumstances the conveyance may be executed by some officer of the court. So you see the statute has come in and supplied what was a defect in the old equity procedure, so that the power of the Equity court to compel the defendant to perform a contract or duty and to do what in equity and good conscience he ought to do is even greater than it was under the old Regime.

The procedure and remedies of the Court of Equity have always had a tendency to extend its jurisdiction. As an illustration, it could compel the examination of litigants under oath and probe the consciences of parties. Grant the



remedies of prevention and compel the performance of contracts. In brief it could take hold of the man himself and make him do his duty in regard to the matters under controversy. This the Court of Law could not do.

The first Parliamentary recognition of the Equity Court as a separate and distinct tribunal was during the Reign of Richard the II. During the successive reigns of Henry IV., Henry V., and Henry VI., frequent opposition to the extending jurisdiction of the Chancellor was developed. No movement, however, was made to do away with the Court of Equity. The movement was rather in the nature of attempts to abridge the power of the court in certain directions. During the reign of Edward IV the principles that were to govern the Court of Equity had become settled and fixed upon a basis and within limitations that were practically the same as exists to-day.

Perhaps it would be desirable for me to state in this connection that during the Reign of Henry VIII. a Statute was passed, which at first was thought would practically destroy the Jurisdiction of the Court of Equity. That was the Celebrated Statute of Uses, passed in the Reign of Henry VIII. The effect of the statute was to turn right which were merely equitable and taken cognizance of by the Equity Court into legal interests or estates. Use is the beneficial right of taking the profits and interest from a property or estate while the legal title remains in another. A holds the legal title for the benefit of B. The property is conveyed to A with the express stipulation that he is to hold the property for the benefit of B. B is the equitable owner of the property. A holds the property in trust for B. At the present time the situation would be that of a trust rather than that of a use. After the passage of this statute the nomenclature was changed and it is now known as a trust. Now the Use or modern Trust was peculiarly a subject for Equity jurisdiction. To impress upon you the magnitude of this jurisdiction I will say that at the time of the passage of this act, that two thirds of the land in England was held by trustees. The Statute did away with the equitable interest altogether. If it had been allowed to stand upon that interpretation it would practically have done away with the equity jurisdiction. But as you remember the court held that it did not apply to certain cases, that it did not apply to personal property, that it did not apply to resulting or constructive trusts, until there was only one case to which the statute did apply, and in that case it was avoided by adding another party to the conveyance. Apparently a large part of the equity jurisdiction was taken away by this statute but by the construction by the courts and the narrowness of the



statute itself it was rendered of little effect.

DURING THE REIGN OF HENRY VIII. the Statute of Uses was passed and a large part of the jurisdiction of the Equity Courts was apparently taken away by its enactment. It apparently changed the use which was an equitable estate or interest into a legal estate. This result however, was prevented by the ingenious construction of the statute whereby the control of these equitable estates under the name of trusts were retained by the Equity Court.

Except by this legislation in Parliament, no objection by Parliament appears after the Reign of Henry VI.. Objection from the Common Law Judges continued down to the Reign of James I. They objected particularly to the restraining by injunction issued out of the Equity Court of actions pending in the Law Courts.

It may appear strange that one court can say to another, you stop your proceedings in this particular case. The court of equity has always had that authority and exercised it in appropriate cases. Whenever there is a question in a Law Court involving the application of equitable principles, the party liable to defeat asks for an injunction against further proceedings at law, and that the whole action may be taken into the Court of Equity. The injunction may always issue to restrain proceedings at law where it is necessary that full and complete justice between the parties should be done. For example I have a contract for the purchase of real property, have been put into possession of the property, I have paid part or all of the purchase price, the holder of the legal title is not in possession but brings an action of ejectment against me claiming that he is the owner of the property, it is a question of title and hence he must prevail in the law court, I have not the legal title, I have simply a contract to the effect that some day upon the performance of certain things, that is the payment of the purchase price he will convey the legal title to me. But I have by virtue of my agreement an equitable title. I could do nothing on the law side for an equitable defense could not be imposed. I must go on the equity side and file my bill and set up all the facts and ask the court to restrain further proceedings in the law court and to settle the controversy in an equitable proceeding. The common law judges did not desire to be interfered with in that way. But their objection were without effect. Previous to the passage of the English Judicature Act in 1873, there had been great improvements in the practice and procedure of the Equity Courts and in consequence they had grown greatly in favor. There was a time however when equity courts were held in bad repute on account of the delay and the great prolixity of its pleading. In the early days, the jurisdiction of the court was administered by the Chancellor alone, as the writ of Edward II was that all



matters of Grace should be referred to the Chancellor. This custom was changed by various enactments, and at the time of the passage of this act the power was finally distributed among eight judges.

But the court of equity, after an existence of over six centuries as a distinct tribunal, has disappeared, and the double system of Courts which so long seemed indispensable has finally passed away. Do not understand me to say that the administration of equity has disappeared in England for that is not so. But the existence of a court of equity as a distinct tribunal has disappeared.

By the Supreme Judicature Act of 1873 it was provided that the several courts in England, to-wit, the High Court of Chancery, the Court of the Queens Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate and the Court for Divorce and Matrimonial causes and the London Court of Bankruptcy shall be united and consolidated together and shall constitute one Supreme Court of Judicature in England.

Now while the Supreme Court of Judicature Act of 1873 was pending before Parliament, the effect upon Justice in England was a question of much discussion in Judicial circles and it was thought it might result disastrously and that equitable rights might disappear altogether and its place be taken by arbitrary laws. To avoid this the Act was amended by the aid of the following clause. That in any matter in which there shall be any conflict between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail. That is the saving clause in the act. By the provisions of the Judicature act and other later legislation upon the same subject the principles of equity have been disseminated throughout the entire body of the English jurisprudence. Each division of the court may exercise equity jurisdiction over all matters where the principles of equity are involved, that come before it. And as I have said if there was any conflict between the rules of law and the rules of equity in regard to the subject matter, the rules of equity must prevail. By the terms of the act equity jurisdiction is conferred upon every English Judge and he is bound to exercise it when the case should be decided upon equitable ground.

The old formality of the Common Law Pleading is no longer necessary. But there is such a fundamental difference between law and equity procedure that you cannot by legislation make them the same.. If you begin a suit for equitable relief it is still necessary to pray for relief, while in a suit at law the action must be for damages.

The English system to-day of Equity procedure and Common Law procedure is practically the same as the code or reformed procedure in this country. The English people had in mind the success of the change made in New York; as I remember, Mr. Field, who was the author of the New York Code was summoned to England by the Committee who has the proposed Reformation of the English system in charge and was examined at length





them in regard to the result of the New York Code.

The authority originally exercised by the Chancellor was subsequently distributed among several equity Judges. The Court of Equity as a distinct tribunal ceased to exist in England from the taking effect of the Judicature Act of 1873. This Act provided that the English Courts, naming them, including the Courts of Equity should be united and consolidated and should constitute one supreme Court of Judicature. This Court was to consist of two Divisions, her Majesty's High Court of Justice, and her Majesty's High Court of Appeals. By the Act a single system of procedure was established and equity powers were conferred upon all the decisions of the Court. By special provision the principles of equity are to prevail whenever there is any controversy between equity and law.

If any of you desire to continue the subject farther, you will find material in:

Spence's Equitable Jurisdiction.

Park's History of Chancery.

Kirley's History of the Court of Equity.

Reeves' History of the English Law

Pomeroy's Equity Jurisprudence Vol. 1, Sec. 1.

Story's Equity, Vol. 1 Chap. 2.

-----oOo-----

Oct. 3 1902.



## LECTURE V.

))0((

I have given you a pretty full account of the English Equity System and the origin of Equity in the English law but as yet I have said nothing about the Court of Equity in the United States. Now you are all well aware that we received our Equity System from England. Many of the states have provided for separate courts of Equity by their different constitutions. That was the case in New York, New Jersey, Maryland, Delaware and South Carolina and later in Michigan, but the matter was afterwards changed so that the same Judge hears Equity and Law cases, although the procedures are kept distinct. The tendency in this country has been to do away with separate Equity Tribunals. We have to-day separate courts of Chancery in a few Southern states and in New Jersey. The New Jersey Court of Equity is one of National reputation. We find New Jersey Equity reports frequently referred to. In many of the states equity jurisdiction was conferred upon the common law courts. The state of Massachusetts for a long time had no separate equity tribunal. The Court of Equity is of comparatively recent origin in the state of Massachusetts. There was a great deal of antagonism to the establishment of such a court by the people of that state. But the Legislature has gradually conferred powers of equity and Equity Jurisdiction on the common law courts. The same is true in Pennsylvania, there the jurisdiction of equity has been of slow growth. It has been devolved largely through the common law courts. For example the common law action may be tried as an equitable action if the necessities of the case demands it. This empowering the common law courts with equity jurisdiction first began in the state of New York in the Forties when the Field Code of procedure was first introduced into that state. It abolished all distinction between common law and equity so far as the mode of procedure was concerned and that is the case in all the Code States. There are certain features of the Equity System, however, which are impossible to be enforced through the common law process, in such cases it is absolutely essential that the procedure on the equity side of the court should be different. When we go on the Law side of the court we seek a judgment for damages, when on the equity side we seek relief. So even in a Code state if you seek damages, you must pray for damages, and if you seek for relief, you must pray for relief. Separate proceedings are always established for such cases as injunction and replevin and for appointments of receivers. In the Code states having a single form of action in Law and Equity these cases have usually been provided for in a separate and distinct form of action.

By the Constitution of the United States the Courts of the United States are given full jurisdiction in Equity



and in Law. From the first down to the present day the practice on the Law side of the Court has been separate and distinct from the practice on the Equity side of the court. It is modeled after the High Court of Chancery in England except as that practice has been changed by special rules of the Court. Remember that even if you are practicing in a Code State where there is no separate Equity procedure, if it becomes necessary for you to step into a United States Court, that you are then in a place where a separate Court of Chancery exists. When you bring a suit on the law side of the court, you may adopt the procedure of the state where the United States Court happens to be sitting. It was a great deal easier in my judgment to get along without knowing equity under the old system where there was a separate court of chancery than it is at present under the code procedure, for in a Code state equitable principles may be appealed to for the decision of the case in whatever jurisdiction the case arises. You do not have to go into a distinct equity court to bring a case in which there is involved equitable principles, but they may be applied in whatever court you start your suit. Under the old system of procedure, if a man did not know the principles of equity and equity procedure he could keep out of it, but he cannot do that under the Code system of procedure for every court is a court of equity.

" In some of the states of the Union there have been from the first separate Equity Tribunals, modeled after the High Court of Chancery in England. In other states there never were separate equity courts but Equity Powers have been from time to time conferred by Statute upon the Common Law Tribunals. In many of the states (the majority at the present time) there is no distinct and separate Equity procedure but legal and equitable principles are enforced through a single form of action. The states may be grouped or classified as follows:

1st. Those states wherein distinct Courts exist, including New Jersey, Kentucky, Delaware, Mississippi, Alabama and Tennessee.

2nd. Those states in which Chancery powers are exercised by the Judges of the Common Law Courts, but according to a separate system of pleading and procedure. This class includes the New England States (Excepting Connecticut which has been recently changed by statute) Pennsylvania, Maryland, Virginia, West Virginia, North Carolina, Georgia, Illinois, Texas, Florida, Michigan, Arkansas and the Dakotas, in which there is separate equity procedure, but the same judge hears equitable and law cases.

3rd. The third group comprises all the other states, and which is characterized by the abolition of the distinctions between actions at law and suits in Equity. Legal and Equitable principles are enforced, as a rule, by means of the civil action. These are known as the Code states.

The United States Courts come under the second class above enumerated. In these courts there is a separate System of equity pleading and procedure, that is modeled



very closely after the Pleading and Procedure of the High Court of Chancery in England."

You now have an outline of the Judicial Machinery of this country, and I wish now to look at the structure of the Courts of equity. I desire to contrast it with the machinery of the common law courts. How does it differ from the law?

One of the striking differences between the law and equity courts as it exists in this country to-day is found in the fact that in equity cases as a general rule we have no jury. Equity cases are tried and determined by the Chancellor or Judge sitting as an equity officer. On the law side of the court all questions of fact must be determined by a jury unless the jury is waived by the parties. In most states statutes provide for the waiver of a jury if the parties agree, but if the party insists upon his Constitutional right of trial by a jury of his peer, then a jury must be procured. Equity passes upon questions of law and fact without the intervention of a jury. Although we may in certain cases have a jury in an equity suit. If the judge is uncertain as to what decision should be given on the facts he may summon a jury to assist him. But the summoning of a jury is a matter within the discretion of the court, the parties have nothing to do with it. The constitution gives them no such right. It is a very rare thing for the equity court to summon a jury. In some states a jury is summoned more frequently than in others, especially in New York, in which state equity courts very frequently summon juries to assist them, particularly in divorce cases. There is this difference between a jury on the equity side of the court and a jury on the law side of the court, on the law side the decision of the jury as to matters of fact is final until the verdict is set aside. On the equity side of the court the finding of the jury is merely advisory. The Court may receive it or not as he desires. It has no binding force upon any one. In the first place the parties are not entitled to summon a jury on the equity side and in the second place the finding of the jury is not binding on the equity side of the court.

We also find this difference in the trial of cases on the equity and law side of the court, on the law side of the court, where there is a jury the witnesses are produced, sworn and testify in the presence of the court and jury. The Court and jury have an opportunity to see the witnesses and to judge and discriminate as to the weight to be given to the testimony of the different witnesses from their acts and appearance. On the equity side of the court, the testimony, as a rule, is not taken in open court. It is not taken before the Judge but before a commissioner or Master in Chancery. The testimony of the several witnesses is taken down in writing, and signed and sworn to by the witness and under the seal of the official before whom the testimony is taken. It is then either handed over to the Judge or read to him by the attorney on the trial of the case or final hearing before the judge. There are some





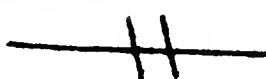
disadvantages in this system. You do not have the witnesses before the court and he must glean the character of the testimony from the written page. But in the state of Michigan, and I presume it is the rule in most all the states, if you desire to take the evidence in open court, you may do so by giving notice to the opposite parties. You have to give them notice within a certain time fixed by statute after issue is joined. Then the witnesses are brought before the Court and sworn and examined as in law cases. The testimony is taken down by the stenographer and not read to the court because the testimony is heard by the judge. It has its advantages because sometimes the evidence when not taken in open court is not read by the court. The testimony is simply turned over to the court and he is assumed to read it. You then make your arguments before the court and base your arguments upon the testimony that has been taken before the Master in Chancery. The Court can decide the case then or take it under advisement and hand down a decree later. He never draws up the decree but it is drawn up by the attorneys after the judge gives a memorandum of what the nature of the decree will be and in whose favor.

The equity procedure is a leisurely procedure. The testimony may be taken at any time that is convenient for the parties. But there is this further objection, however, in equity cases all evidence must go in. The master in Chancery has no authority to exclude any evidence. You must, however, state your objection and the ground of objection because when it comes to a final hearing before the Judge the objection may be insisted upon. But the judge in ruling upon the objection will have to read the evidence objected to and may be unconsciously affected by the testimony which is improper on account of being irrelevant or immaterial or incompetent.

I may say for the benefit of the Michigan students that we have no Master in Chancery in this state. The Master in Chancery is an officer recognized by most states. We have instead of a Master in Chancery a Circuit Court Commissioner. So in all equity cases the testimony is taken before the Circuit Court Commissioner.

#### SOME POINTS OF DIFFERENCE BETWEEN THE LAW COURTS AND EQUITY COURTS.

Law Courts may always have a jury for the decisions of questions of fact. In the Equity Courts a jury is unusual, it may be summoned by the equity judge but the parties have no right to the jury. In the law courts the verdict of the jury, if regular, is binding and decisive. In Equity Courts it is simply advisory. In law courts the testimony is taken in open court. In equity courts it is taken before the Master in Chancery (in the state of Michigan before a Circuit Court Commissioner). In law courts improper evidence is excluded upon the trial. In equity courts all evidence goes in before the Master, but may be excluded by the judge upon the hearing of the case.





## LECTURE VI.

--o--

Before taking up the principles of equity as it is administered in the Courts of equity to-day, I wish to say a word or two with regard to the general scheme of the courts.

Undoubtedly during the early history of the court of Equity the individual conscience of the Chancellor played an important part. During the formative period there were no settled principles or precedents and the chancellors decided cases that came before them according to their views of good conscience and equity. They appealed to their personal conscience. This was undoubtedly the character of equity decisions while passing through its formative period. They attempted to modify the rules of law where they considered them harsh and unsuited to the particular case and to supply remedies where the law was deficient. But by so doing each case they formed precedents and so in time a body of precedents was formed so that later the conscience of the chancellor began to be governed and regulated by this body of precedents in their decisions of chancery cases. With the increasing number of precedents an orderly system of equity was developed that did away with the personal conscience of the chancellor. So to-day when we speak of the conscience of the court of equity we mean the juridical conscience and not the individual conscience of the chancellor. The individual conscience as guided by the fixed principles of equity. In determining case the chancellor is bound to be governed and guided by certain fixed principles laid down in precedents and does not appeal to his own individual conscience. I do not wish to convey the idea that the court of equity followed precedents in the same slavish way that the common law judges did, and that they were bound by the letter of the precedent. They used them as guides in their decisions and were able to extend them so as to fit new relations. A common sense application of precedents.

## NATURE OF EQUITY.

In the formative period of the equity court cases were undoubtedly decided by the Chancellors according to their personal notion as to what the proper remedy should be. In a general way it may be said that the court of Chancery during this period was engaged in tempering the harshness of the law and in furnishing relief where the law failed to give it. During the formative period there was necessarily considerable inconsistency in the decisions of the court of chancery. A body of precedents that served to limit and control the decisions of the equity tribunal at length was formed. Equity judges began to decide cases according to settled principles. These were not followed slavishly but as guides simply. The conscience of the court came to be a juridical conscience and not a personal one.



Now from what I have said you have got an idea of the nature of equity during the infancy of the court. The nature of equity is a great deal different to-day from what it was during the formative period. No equity court to-day would attempt to decide a case by appealing to his own conscience, to his own standard of right and justice. The departures of the equity court are within settled principles. The modern chancellor is governed by equitable principles embodied in precedents.

Equity to-day as administered in our courts is a system of Jurisprudence founded upon precedents of right, justice and morality as explicated, settled and promulgated in the decisions of its courts. It has capacity for an orderly and regular growth in the direction of its settled principles. As a system it is flexible and may always be extended to new conditions and to new relations. If you wish to inquire more into the nature of equity than is found in these few suggestions, I wish you would read:

Story's Equity Jurisprudence. Vol. I, Chapt. I.

So much for the nature of Equity I will now pass to a brief outline of the subject of equity as will be treated in this course of instruction. Equity is a science and like any other science has its maxims. There are general and special maxims. The general maxims apply to equity as a whole and the special maxims only apply to particular parts of equity. In this course we will have to do with the general maxims of Equity. This course will be divided into four parts. The first part will be devoted to the general maxims of Equity. In these general maxims you will find the great fundamental principles upon which the system rests.

#### GENERAL OUTLINE OF THE SUBJECT OF EQUITY.

##### 1st. General Maxims of Equity.

Equity is a science and like every other science has its maxims. These general maxims are the embodiment of the fundamental principles of equity.

A maxim is an embodiment of a truth in a short and familiar saying.

From what I have said to you in connection with the nature and history of equity you have learned that there are certain Titles only recognized and enforced in a court of equity. The second division of the subject deals with these equitable titles. An Equitable Title is one that is recognized and enforced only by a court of equity. As an illustration, a piece of property is given to me by a neighbor with the understanding that I shall hold the property for the benefit of another party. The legal title to that property is in me but by the terms of the agreement I am bound to hold it for the benefit of the party named. On the law side of the court the third party would have no standing. He could not come into court



and take me to my duty. In the law court I am the absolute owner of that property, but on the equity side I may be brought to an accounting. It is the equitable title that the equity court recognises which is vested in the third party. The books define an Equitable Title as one which a Court of Equity will take cognizance of and enforce. As another illustration of Equitable Title, you remember that in your study of mortgages, that upon the failure of the mortgagor to pay the debt at the time it is due according to the conditions in the mortgage, the property became absolute in the mortgage. That was so even if the mortgagor had a legal excuse for failing to pay. The law court would not allow him any relief. The Court of equity said it is only right that he have a chance to make the payment and redeem his property. It was at first only an equitable right but after a time courts of equity held it to be more than an equitable right but an equitable title vested in the mortgagor and his heirs after condition broken until it was cut off by foreclosure of the mortgage. This title was called the Equity of Redemption.

2nd. The second division of the subject is into Equitable Title, equity of redemption as an example of equitable title.

As soon as we have finished the subject of Equitable Title we will take up the subject of Equitable rights. I want to make the distinction clear between Equitable Title and Equitable Rights. Equitable Title is one of which a Court of Equity alone will take cognizance and protect. An Equitable Right is a right in a Court of Equity to some one of the Equitable Remedies. For example, I buy a piece of property from a certain party and we both suppose that a certain description that we have agreed upon will include the property that I have purchased. As a matter of fact the description includes much more property than what I have purchased. So upon the face of the deed I am the owner of more property than in equity and good conscience I am entitled to own. There is a mutual mistake between the parties. The party who would lose if the deed was allowed to stand as it is may go into a court of equity and ask that the deed be reformed so that it will represent exactly the agreement of the parties. This is an equitable right to which he is entitled. It is called the Remedy of REFORMATION.

Here is another illustration. A Young man just starting into life enters into an agreement with a relative who is aged and infirm, by which the young man agrees to take charge of the property and business of the old man and turn the profits over to him, except a certain amount the young man is to receive out of the profits for himself, to do this so long as the old man shall live and in consideration for this service the old man agrees to will him all his realty and personalty on his death. The old man continued to live some twenty years after the making this agreement and the young man who was a young man when he started in became a middle aged man and during all these years served him faithfully. The old man was induced by other





relatives who concluded it was not fair that the young man should get all this property, to divide up his property among them. The young man upon the death of the aged relative filed a bill in equity asking that these various conveyances be set aside that the old man was incompetent when he made them and if not incompetent that the grantees took them with full notice of the contract relation existing between the old man and the young man and therefore held the property subject to any equities between the two. And asked the court to decree that the young man had an equitable lien on the property. There had been prepared a will conveying this property to the young man but at the instigation of the other relatives the old man had destroyed it. The position was taken that the destruction of a will by an incompetent person is not a revocation or destruction of a will at all. A copy of the old will was found and it was decreed by the court that it be enforced. The equitable right was the right to go into court and enforce the equitable lien upon the property.

Whenever property is sold and no security is taken for the payment of the purchase price, a lien exists in favor of the vendor for the unpaid purchase price. This is known as the VENDOR'S LIEN.

3rd. The third division of this subject is EQUITABLE RIGHTS. As examples of these rights, RIGHT OF REFORMATION. and right TO ENFORCE EQUITABLE LIEN. An Equitable right is a right to some one of the Equitable Remedies.

The last division is that of Equitable Remedies. I will give you a few examples of equitable remedies so you will gain an idea of what we mean by them.

The first remedy is that of Specific Performance. The remedy which compels a party who has entered into a contract to fulfill the contract according to its terms. It is a remedy that the equity courts give only through their discretion. If there is a complete remedy at law then this remedy will be denied. But if you make out a proper case it is the duty of the court to enforce a specific performance of the contract. The court will usually do so where the subject matter of the contract is land. The theory being that when a man contract for a certain piece of land he wants that particular piece of land and not because he wants damages. On the other hand it is very rare for an equity court to grant a specific performance of a contract where the subject matter is personalty. It goes on the theory that personal property can be duplicated, while there no two pieces of real property alike.

4th. The fourth division of the subject is EQUITABLE REMEDIES. The principal Equitable remedies are the following:

1st: Specific Performance. By this remedy the court compels a party to do what he has agreed to do and the remedy will be granted so long as there is no remedy which is adequate at law. It is not generally considered adequate by the courts where the subject matter is realty.

2nd. INJUNCTION.



The Writ of Injunction is one of the most important of the Equitable Remedies. It is a remedy that is very frequently resorted to. In almost all equity cases where a party seeks relief he is apt during some part of the case to desire the restraining influence of the Court. The Writ of Injunction is very extensively used of late along new lines in connection with the labor troubles. That is an illustration of the general state that equity will extend its principles to meet new relations and new conditions.

An INJUNCTION may be defined as a judicial process issuing out of a court of equity by which a party is restrained from doing a particular thing or is commanded to do some particular thing.

Injunction are divided into two kinds, PROHIBITORY INJUNCTIONS and MANDATORY INJUNCTIONS.

---oOo---

Oct. 10 1902.



## LECTURE VII.

--oOo--

In my last Lecture I was speaking about Equitable remedies and had spoken about the principal kinds of equitable Remedies. I desire to give you an outline of the field of this subject, I had suggested some of the principal equitable remedies and had defined Injunction I believe. Injunction is a writ that can only be issued out of a court of equity or a Court having Equity Jurisdiction. It is a writ that is prohibitive in its nature, a writ that prohibits a person from doing a particular thing. It may be preliminary and issue upon the filing of the bill for the keeping of the subject matter of the suit in statu quo or may be given as a final remedy in the form of a decree. In either case it must be observed and obeyed by the defendant and is a very effective remedy. It is called the strong arm of Equity. It may be granted upon the pleadings as a preliminary injunction or upon the hearing of the case upon both the pleadings and fact in the form of a final decree. The injunction is frequently used for the purpose of restraining an action in the law courts where it is equitable and just that the decision should be made upon equitable grounds. Suppose a man is in possession of a piece of realty under a contract of purchase and the vendor has the legal title, the only title the court of law will recognise, the vendee has possession simply under an agreement on the part of the vendor to convey, the vendor brings an action of Ejectment against him on the law side of the court, the vendee has no possible defense because the vendor has the only title that a court of law will recognize, that is the legal title, and the vendee has merely an equitable title, he must go into a court of equity and pray for an injunction restraining the action on the law side of the court and ask that the case be decided by a court of equity. If you are practicing in a common law state where law and equity are enforced by separate and distinct tribunals this will be necessary, but if you are practicing in a Code State this will not be necessary because the same court will decide the case upon equitable principles if it should be so decided. The injunction is also frequently used to prevent the invasion of private legal rights. Suppose a man is the owner of land situate upon a running stream, he is the riparian proprietor and he uses the stream for domestic purposes, and some one who is the owner of the land above him on the same stream begins to erect a dye house, the refuse of which will discolor the water and make it unfit for use, of course he can wait until the damage has been done and then sue for damages and sue him every day for the damage done but the remedy would hardly be adequate and a multiplicity of suits would result which the law abhors, the party must go into a court of equity and apply for an injunction, he may apply for an injunction restraining him from the further use of the stream after the building has been erected or apply for an in-



junction even before the dye house is erected if he can show to the court of equity that irreparable injury will follow its erection. The injunction in modern times is very extensively used in connection with labor troubles. That is an illustration of the general statement that equity will extend its principles to meet new relations and new conditions. That equity can always adapt its processes to the changing conditions of affairs. Injunctions are of two kinds, PROHIBITORY INJUNCTIONS and MANDATORY INJUNCTIONS. The mandatory injunction as the name implies commands something to be done, and the prohibitory injunction as the name implies prohibits the doing of a particular thing. The writ of mandatory injunction has been denied in some jurisdictions, but usually the right to a mandatory injunction is recognized and may be issued upon a proper showing before the court, usually it is not issued as a preliminary remedy only as a final decree and as a result of the testimony that has been taken in the case. To illustrate the use of the Mandatory Injunction. A mill owner has the right to flow a certain amount or certain tract of land with back water from his mill dam, he desires to increase the power of his mill, so he puts flash boards on the top of the dam and the back water is pushed on to the land farther than the mill owner has a right, the owner of the land may sue for damages, but he does not want damages, he wants the land for agricultural purposes and he asks the court of equity to order the defendant mill owner to remove the flash boards from the top of the dam, in this case the court in its final decree not only order the defendant to remove the boards by a mandatory injunction but accompanied its decree with a prohibitory injunction prohibiting the defendant from putting the boards back after they were removed.

Another remedy you will have frequent occasion to use is the remedy of REFORMATION, which is the appropriate remedy where through mutual mistake of the parties or the mistake of one party and fraud of the other party, the contract entered into is not the real contract intended. If the mistake is a mistake of one party only you cannot have the remedy of reformation. But where there is mutual mistake or mistake of one party brought about by fraud of the other then you can go into a court of equity and ask for a decree reforming the contract or instrument so it will conform to the agreement of the parties. There is one thing I wish you would keep in mind in connection with an application for a decree of this kind, you should never ask the court for this kind of remedy or relief unless you are prepared to sustain your bill by the clearest possible evidence because the remedy changes the written agreement between the parties and a court always hesitates to change an agreement in writing between the parties and will do so ~~where~~ only where there is practically no doubt that there has been a mutual mistake between the parties or mistake of one party induced by fraud of the other.

Another remedy is that of cancellation or rescission, that is where the minds of the parties have failed to meet in a certain transaction through mistake of one party or mutual





mistake and the remedy at law upon the instrument is not full and adequate. That remedy is never granted where the party seeking relief would have full and adequate defense in an action at law. It is never granted where the defense is apparent upon the face of the instrument.

There are other remedies that are frequently made use of, one of the most frequent remedies in modern times is that of RECEIVERSHIP. A great deal of the railway business of the country is done through the instrumentality of receiverships. A court of equity takes up a bankrupt corporation and through a receiver runs the business until it is put on its feet again. It is a very important branch, particularly as connected with corporation law.

Another remedy is the remedy of HABEAS CORPUS. This is a writ to prevent a party from leaving the jurisdiction of a court where the court desires the party to remain in the jurisdiction to answer the process of the court. When a writ of habeas corpus is issued against a party about to leave the jurisdiction he is taken into custody unless he gives the security ordered by the court. A bond is usually required that he may give and thereby be released from custody.

These are the principal remedies in a court of equity but let me say by way of conclusion that the court of equity has the power to devise any new remedy that may be necessary for the purpose of working out equity and justice between the parties.

The injunction may be either in the PROHIBITORY or MANDATORY form. The prohibitory injunction forbids a party from doing a particular thing, the mandatory injunction commands the party to do something. Another remedy is RECTIFICATION by which an instrument which does not represent the contract of the parties may be changed provided the error has come from mutual mistake or mistake of one party accompanied by fraud of the other. Another remedy is the remedy of RESCISSION by which an irregular contract under proper circumstances may be cancelled also the remedy of RECEIVERSHIP and the writ of HABEAS CORPUS.

I have already given you a general outline of the field of the subject, as we shall take it up.

1. General Maxims of Equity.
2. Equitable Title.
3. Equitable Rights or Grounds of Relief.
4. Equitable Remedies.

This matter of classification is of some importance. For Classification of the subject see:

Pomeroy's Equity Vol. 1, 118 to 118.

Bispham's Principles of Equity, chap 2.

The classification I have given you is the one adopted by Bispham and with some changes adopted by Pomeroy. If you look through the older books you will find the arrangement different. Story in his work divides the field of equity into that part which equity has exclusive jurisdiction; that part which equity has concurrent jurisdiction; and that part which equity has auxiliary jurisdiction. This is the division of Adams and Snell and all the older writers.



Where the courts of equity were distinct tribunals this question of jurisdiction ~~of~~ was one of great importance. But in this country many of the states have abolished this distinction between legal and equitable remedies. We will now take up the maxims of Equity.

#### GENERAL MAXIMS OF EQUITY.

I have already explained what is meant by the term or expression general maxims of equity and I will now enumerate them with such explanations and citations as I may think necessary for your understanding them.

A general maxim is the statement of a familiar truth or fundamental principle that applies to the whole system of equity.

1. Equity will not by reason of a merely technical defect suffer a wrong to be without a remedy.

Now this maxim is sometimes couched in different language. Dispham says that equity will not suffer a right to be without a remedy. Some other writers adopt this brief form, wherever there is a right there is a remedy. In the older works you will find the latin form which is generally translated literally wherever there is a right there is a remedy. The principle embodied in this maxim is the very basis of equity jurisdiction. One of the principle reasons for the existence of the court of equity is to be found in the fact that the court of equity has always sought to supplement the remedies of the law courts so no person should be without relief at the hands of the courts. It is elemental and lies at the basis of the whole equity system.

The principle of this maxim lies at the basis of the equity system for the end and aim of equity court is to furnish remedies for wrongs that the common law either fails to redress at all or redresses but inadequately.

Southern California Ry. Co. v. Rutherford et al.

(62 Federal Reporter 796)

Illustrative cases, page 3.

The decision in the case of Southern California Ry. Co. v. Rutherford was given in 1894, in which an injunction was issued in connection with labor difficulties and in which the decree of the court was somewhat out of the usual order and the decree was based upon the principle of this maxim. Certain railroad employees refused to haul trains that had attached Pullman cars. The Southern California Ry. Co. was under contract with the Pullman company to haul its cars from the west to the east and if these cars were not hauled there would be a breach of the contract. The men insisted in remaining in the employment of the company although they refused to have anything to do with trains having Pullman cars attached. The court said that the position of the men was unjust and inequitable and that the company had no adequate remedy at law. The company did not want damages it wanted these cars hauled. The court said: "It is manifest that for this state of affairs



the law--neither civil or criminal-- affords an adequate remedy. But the proud boast of equity is "Ubi jus, ibi remedium." It is the maxim which forms the root of all equitable decisions. Why should not men who remain in the employment of another perform the duties they contract and engage to perform? It is certainly just and right that they should do so, or else quit the employment. And where the direct result of such refusal works irreparable damage to the employer, and at the same time interferes with the transmission of the mail and with commerce between the states, equity, I think, will compel them to perform the duties pertaining to the employment so long as they continue in it. If I unlawfully obstruct by a dam a stream of flowing water, equity, at the suit of the party injured will compel me by injunction, mandatory in character to remove the dam, and prohibitory in character, from further interfering with the flow of the stream; and if I unlawfully erect a wall shutting out the light from another, equity will compel me to tear it down, and to refrain from further interfering with the other's rights. It is true that such cases are not precisely like the present one, yet the principle upon which the court proceeds in such cases is not substantially different. And if it be said that there is no exact precedent for the awarding of an injunction in the present case, I respond in the language of the court in the case Toledo, etc., Ry. Co. v. Pennsylvania Co. 54 Fed. 751; Every just order or rule known to equity courts was born of some emergency, to meet some new condition, and was therefore in its time without precedent. If based on sound principle and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constant and varying demands for equitable relief".

I wish you to study this case carefully for the decision of the court is based upon this first maxim.

While it is true that the principle of this maxim is the basis of equity jurisdiction it is also true that it must be applied with certain limitations. In the first place we should bear in mind that there are many real wrongs that cannot be remedied either in law or equity. In order that a wrong can be righted in equity it must be one that a court of equity can take cognizance. As said by Mr. Justice Hunt: It cannot exercise jurisdiction or assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations.

This maxim while very general in application must yet be used within certain limits: First, if the wrong is merely a moral one it will not be remedied by a court of equity simply on the ground of its being a moral one. In order that the court of equity will grant relief the wrong must be one of which



judicial cognizance is taken.

Rees v. City of Watertown.

(19 Wallace 111)

Illustrative cases see 5.

Then there are wrongs that are more apparent than real, wrongs that are wrongs within the feelings of the parties simply. Equity will not interfere in these cases or afford relief.

Equity does not interfere to remedy any wrong where the right and remedy falls entirely within the domain of the law, as usually applied, equity will not afford relief where there is full, adequate and complete remedy at law. The remedy at law must be plain, must be adequate and complete and if any of these elements are lacking equity jurisdiction will attach.

2. Equity will never grant relief where there is a full, adequate and complete remedy at law.

Teft v. Stewart, 31 Mich 367.

Illustrative cases 264.

But if either of these elements be lacking (I refer to the adequate, full and complete remedy at law) the jurisdiction of equity will attach.

Watson vs. Sutherland. 5 Wallace 74.

Illustrative cases, p 732.

I wish you to prepare this case for recitation.

---oOo---

Oct. 17 1903.





## LECTURE VIII.

---0---

In my last lecture I was talking about the first general maxim of equity, "Equity will not by reason of a mere technical defect suffer a wrong to be without a remedy." I was discussing the limitations upon the application of that principle or general maxim. One of the limitations is that equity will never grant relief where there is a full, adequate and complete remedy at law. If any of these elements are lacking then the equitable remedy will be granted. There is another principle I should discuss in this connection, as it is in a way a modification of the application of this maxim. Namely when an Equity Court gets jurisdiction for any purpose of a subject it always retains jurisdiction until complete justice is done between the parties. Even if by so doing the court of equity passes upon questions that ordinarily belong to a court of law.

(Fictation)

Another principle that may be discussed in this connection is that equity when it has once taken jurisdiction of a subject will retain the matter until full and complete justice has been done between the parties even though by so doing the court passes upon questions that ordinarily belong to a court of law.

For example of this principle, suppose you apply to a court of equity for an injunction to restrain proceedings in a court of law upon the ground that you have an equitable defense to the action that has been brought against you on the law side of the court. Now the proceedings are restrained and the whole matter transferred to the equity side of the court. The equity court has now jurisdiction of the subject matter and from a consideration of the whole matter it appears that you are entitled to a money judgment the equity court may grant it, it is sustained by authority that where a court of equity acquires jurisdiction for granting an injunction it may retain jurisdiction of the case and give relief in favor of either of the parties that equity and justice demand. It is not part of the functions of the court of equity ordinarily to give damages that are merely compensatory. A party desiring damages it is his duty to go on the law side of the court and start his action but there are certain cases where a court of equity taking jurisdiction for some other purpose may retain it and give damages. Suppose for example, the purchaser of a piece of realty files his bill in equity for specific performance, at the time the bill is filed it is possible for the vendor to specifically perform his contract, he has the legal title to the property and may be compelled to convey to the vendee, but pending the controversy he disposes of that property and disposes of it in such a way that the party purchasing is an innocent purchaser, and for value and without notice of the proceedings (that could not be done in some states where the filing of the bill or starting of the suit is considered constructive notice to all parties of the control which the court exercises over the subject matter or property involved in the suit, this constructive notice is called *lis pendens*) but suppose for the sake of the illustration that the third



is an innocent purchaser. It is impossible for the court of equity to decree specific performance because it is impossible for the defendant to obey the order of the court and you should always remember that a court of equity will never decree that the defendant shall do something which is impossible for him to do. So under those circumstances instead of dismissing the suit for the reason that the court cannot grant the relief prayed for in the bill the court will retain the case and give damages for the breach of contract. Whenever the vendee in a contract for the sale of realty files a bill against the vendor not knowing at the time of the filing of the bill that it is impossible for the vendor to perform the contract, the court will retain jurisdiction of the case and give compensatory damages. The court will not do this if at the time of the filing of the bill for specific performance the vendee understood that it was impossible for the vendor to perform.

(Dictation)

Illustrations of the principle of the equity court getting jurisdiction for the purpose of issuing an injunction may retain jurisdiction until full and complete justice has been done between the parties.

Cornelius vs. Morrel. 12 Weiskell Tem. 630.

Russ vs. Ware, 6 Bratton, Virginia, 50.

Compensatory damages as a rule will not be given by an equity court but may, however, where the court has obtained jurisdiction of the case and it is equitable and just that they should award damages as where in a suit for specific performance the vendor has so placed himself that he cannot perform, the vendee not knowing at the time of the commencement of the suit that it was so, he is entitled to damages.

Morse vs. Upendorff 11 Page's Chancery 371.

Story's Equity Jurisprudence par. 796

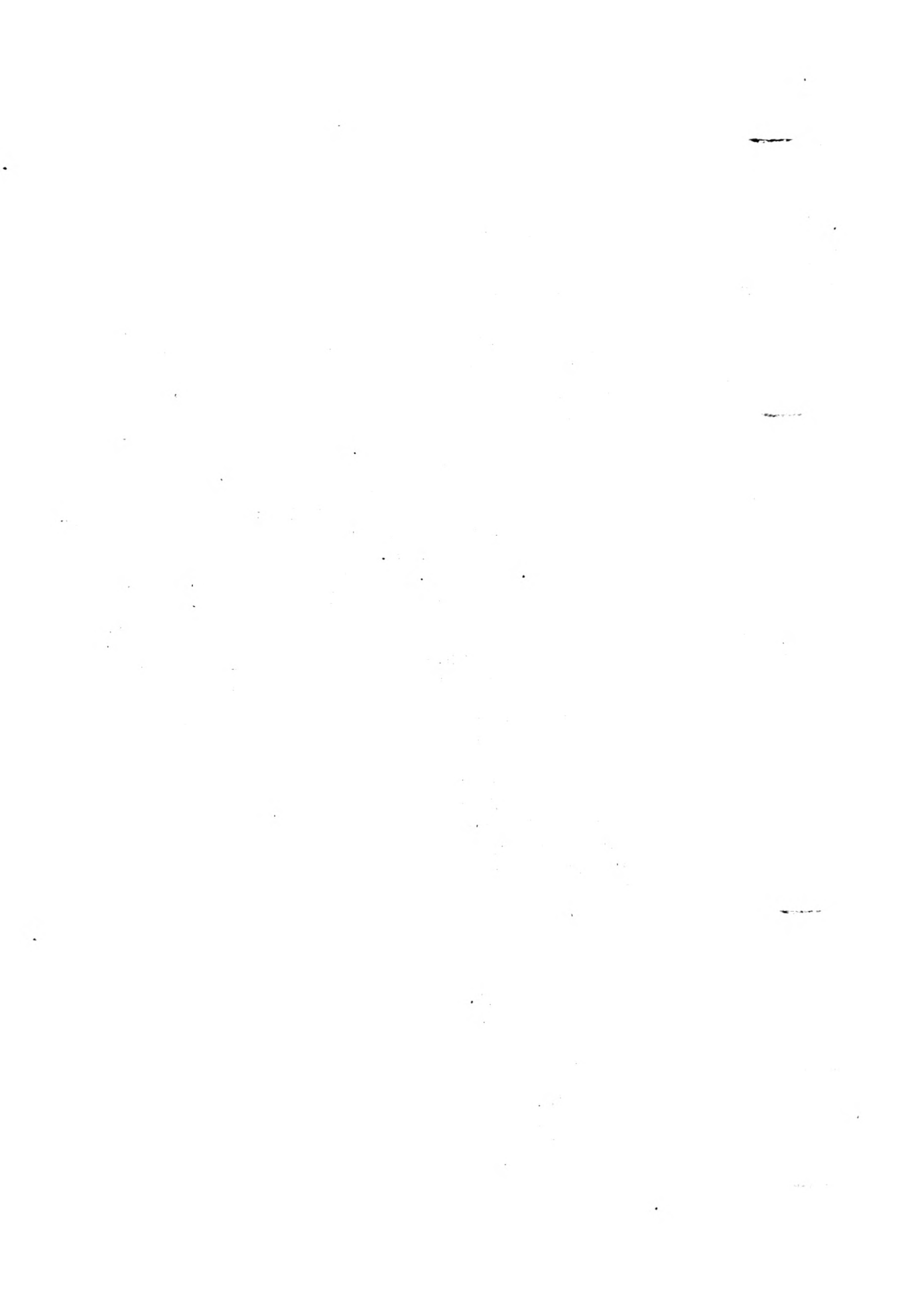
The maxim does not apply where a party has been guilty of laches or has in any way destroyed or waived his right to an equitable remedy. For one of the maxims that we will study later is that, equity aids the vigilant and not the one who slumbers upon his rights.

(Dictation)

This Maxim does not apply where a party has been guilty of laches or has in any way destroyed or waived his right to an equitable remedy.

Pomeroy's Equity. Vo. 1, par. 124.

And further the maxim does not apply where a party has sought a remedy in a law court and failed to obtain it. Equity will not grant relief simply because a man has been beaten on the law side of the court, if the remedy is properly a legal one. If the remedy is properly a legal one and the court has refused to grant it he cannot then go into equity and get relief. The case I called your attention to in my last lecture of Rees v. City of Watertown (19 Wallace 107) is a good illustration of this proposition.



The parties in that case had attempted the collection of taxes through Mandamus proceeding, which was the proper mode in to take under the laws of the state of Wisconsin. They failed in their efforts in this direction and went into a court of equity and asked for a decree authorizing the levying of the tax. The court said that a man cannot have relief simply because his legal remedy has failed, when the remedy he seeks is purely a legal remedy. If a party by mistake gets into a court of law and is thrown out because his remedy is a legal one then he can go into a court of equity for relief, but not where his case is strictly a legal one and he has been beaten in a court of law.

(Dictation)

The maxim does not apply where the legal remedy has failed. The total failure of the ordinary remedies does not clothe the court of equity by virtue of this maxim with power to grant relief.

Rees v. City of Watertown (19 Wallace 107)  
Illustrative cases page 5.

I wish you to prepare this case for recitation and examination.

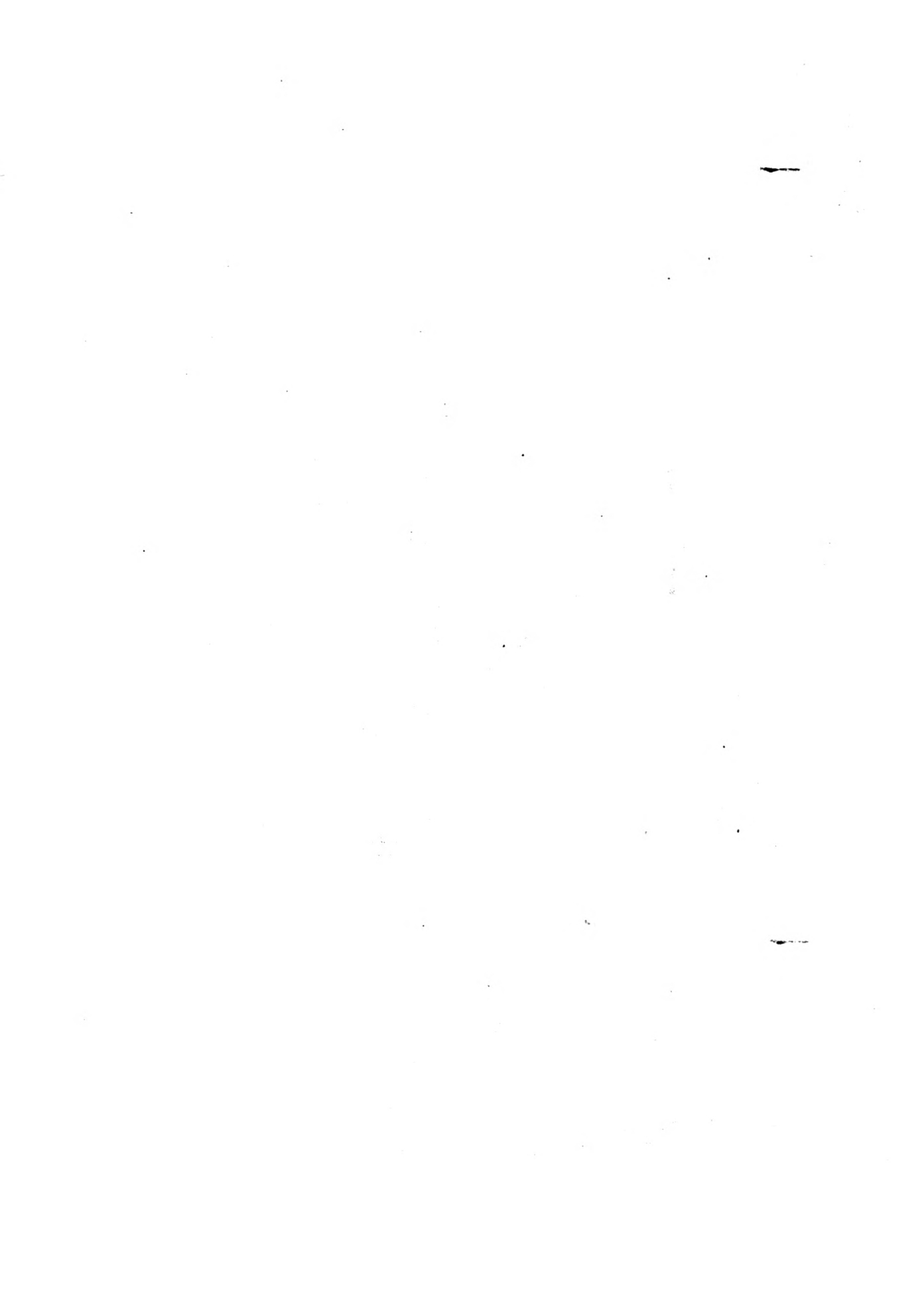
There is another limitation to this maxim. A Court of equity will not grant relief where the amount involved is too small. The amount involved must be at least the amount fixed by statute. The court of equity will not trouble itself with small things. The amount regulated by statutes in most cases is one hundred dollars. This is jurisdictional and must appear upon the face of the pleadings, upon the face of the bill that the amount involved is at least the amount fixed by statute as the limit or minimum of the jurisdiction of the court. It is not proper to wait until you put in your proof but must appear in the bill.

(Dictation)

The maxim does not apply where the amount involved is so small as to be outside of the jurisdiction of the court. This is a matter that is fixed by statute and is usually fixed at a hundred dollars.  
3d maxim is as follows:

### 3. EQUITY FOLLOWS THE LAW.

This is usually classed as a maxim but it is partial and limited in its application. In a general way it may be said that equity in obedience to the principle of the maxim conforms to the general rules and policy of the law and follows and applies well settled principles of the law, whether contained in the common law or statute law. This principle is illustrated in the case of *Dibrell v. Carlisle* (48 Miss. 691) The court in that case says: "The first question involves the construction of the limitations in the deed creating the trust estate. It is a common maxim that equity follows the law. There a rule of the common or statute law is direct and governs the case with all



its circumstances or the particular point, a court of equity is as much bound by it as a court of law and can as little justify a departure from it. A court of equity cannot disregard the canons of descent. In general in courts of equity, the same construction and effect are given to perfect trust estates as are given by courts of law to legal estates. The incidents, properties are the same. The same restrictions are applied as to creating estates and bounding perpetuities and giving absolute dominion over property. The same modes of construing the language and limitations of the trusts are adopted. The words "heirs of the body", in the conveyance of a legal estate are words of limitation of the estate to the donee, and not words of purchase for the heirs of the body. These words create an estate in fee tail, which, by our statute, is converted into an estate in fee simple. "

(Dictation)

This maxim is limited in its application but in a general way it may be said that equity in obedience to the principle of the maxim conforms to the general rules and policies of the law and follows and applies well settled principles of law.

Dibrell v. Carlisle (48 Miss. 691)

Illustrative cases page 9.

Although a court of equity recognizes the general principles and well settled rules of the law it may under certain circumstances where justice and equity may require avoid the strict application of its principles, for example, under the English canons of descent the estate passes to the eldest son when the father dies intestate. Now suppose the father has two sons and intends to convey by will part of the real estate to his youngest son, but the oldest son says I understand perfectly well your desires, you do not need to make a will and upon your death I will see that your intentions are carried out and I will convey the property which you desire shall go to him to my younger brother. Now the father relying upon his eldest sons promise does not make any will but dies intestate. There would be no doubt but under the English Canons of descent the property would pass to the eldest son and he would take the legal title. Equity recognises that the legal title passes to him by canons of descent and do not take the position that the younger brother has any legal estate, but it will say that an injustice has been done and a fraud perpetrated which equity should give relief. We cannot say that the younger brother has the legal title but we can say that the elder brother has the legal title but under circumstances that he should hold it in trust for the younger brother.

(Dictation)

Although a court of equity recognizes the general principles of the law it may under certain circumstances where justice requires avoid the strict application of its principles by making of the holder of the legal title a trustee for the benefit of one who has an equitable interest.





Story's Equity Jurisprudence par. 64.

In this paragraph you will find this illustration that I have given in substance.

Equity may be said to follow the law in that it applies to equitable estates some of the rules by which legal estates are governed. Take the statute of Limitations for an example, it says nothing in regard to equitable estates or interest (in many of the states the language of the statute has been changed so as to apply to both legal and equitable estates). But where the change has not been made or before the change was made it was the custom of courts of equity to regulate equitable estates by the statute of limitations.

(Dictation)

Equity may be said to follow the law in that it applies to equitable estates and interests some of the rules by which legal estates and interests of similar kind are governed. For example the Statute of Limitations would apply in equity cases as in law cases as a rule even though equitable interests are not mentioned in the statute.

Equity usually applies to equitable interests the laws of descent and inheritance.

Pomeroy's Eq. par. 426.

Bispham's Eq. par. 38.

Story's Eq. 64 b.

I will conclude what I have to say as to the maxim that equity follows the law by repeating my former suggestion that the maxim is partial and limited in its application and cannot like the other maxim be treated as embodying a general principle. I will not take up the third general maxim which is as follows:

3. Where there are equal Equities the first in order of time shall prevail.

That is the wording that is ordinarily given. But I think that the wording is an unfortunate one because it is apt to be misleading. Where the equities are equal the first in order of time will prevail, let us see what this means. What is the meaning that it conveys to you. For example: the owner of piece of real estate gives two mortgages upon it, to two different mortgagees. The one taking the second mortgage does not know of the existence of the first mortgage, neither of the mortgages being recorded. The equities of the mortgagees are exactly equal. But according to this maxim the older equity will prevail, if that is what the maxim means. There is another maxim usually considered in connection with this one, that is, where the equities are equal the law shall prevail. Where the equities are equal or evenly balanced, equity will have nothing to do with the case, one party is not entitled to relief any more than the other. Equity simply says you go to a court of law and if one of you have a legal right then that shall prevail. When the equities are in all other respects equal except in



matter of time the older equity shall prevail. This whole subject is very nicely discussed in the case of *Rice v. Rice* (Drew 73): Illustrative Cases page 23. "The question to be decided in this case is whether the equitable interest of the plaintiffs in respect of the vendor's lien for unpaid purchase money is to be preferred to the equitable interest of the defendant as equitable mortgagee.

Where a person has sold a piece of property without any security he would have what is known as the vendor's lien upon the property for the unpaid purchase money. After he has made the sale, the vendee gives an equitable mortgage upon the property, one that is irregular in form but which would be recognized in a court of equity. Equity looks at the intent rather than the form. The vendor's lien and the interest of the equitable mortgagee are practicably equal. Which shall prevail. Let me read from the decision in this case of *Rice v. Rice*:

"What is the rule of a court of equity for determining the preference as between persons having adverse equitable interests. The rule is sometimes expressed in this form, 'As between persons having only equitable interests, that which is prior in time is the prior right. This is an incorrect statement of the rule, for that proposition is far from being universally true. In fact, not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal, as in the common case of the two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees where the second assignee has given notice and the first has omitted it."

"Another form of stating the rule is this, 'As between persons having only equitable interests, if their equities are equal, the party who is prior in time has the prior right'. This form of stating the rule is not so obviously incorrect as the former; and yet even this enunciation of the rule (when accurately considered) seems to involve a contradiction, for when we talk of two persons having equal or unequal equities, in what sense do we use the term 'equity?' For example, when we say that A has a better equity than B, what is meant by that? It means only that according to those principles of right and justice which a court of equity recognizes and acts upon, it will prefer A to B, and will interfere to enforce the rights of A as against B, and therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. If the Court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time—how can it be said that the equities of the two are equal? i.e., in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other? To lay down the rule therefore with perfect accuracy, I think it should be stated in some such form as this,

----- (Continued in next lect.)

Oct. 17 1902.



## LECTURE IX.

----O----

(Cont'd from Lect. VIII.)

"As between persons having only equitable interests, if their equities are in all other respects, priority of time gives the better equity, or *qui prior est tempore potior est jure*."

Oct. 17th 1902.

-----

I was speaking of the maxim which I think I numbered three, where the equities are equal the first in order of time shall prevail. If we interpret that maxim literally we should not arrive at a correct conclusion. The maxim seems to mean that where two equities are exactly equal the older will prevail, that is not always the case by any means. A Court of Equity does not decide equitable cases upon the principle of priority of time excepting in a case where the equities are in all other respects equal except that of time then the equity that is the older will prevail. In a case of this kind a court of equity will look over the whole case and if the court can find any equity upon which to decide the case excepting this equity which grows out of priority of time, it will decide it upon that right rather than the equity connected with priority of time. But if after looking over the case it finds that the equities existing between parties having only equitable interests are equal except in matter of time then it will base its decision upon priority of time. The case of *Rice vs. Rice* is an illustrative case upon this maxim. I think I cited it to you in the last lecture. In this case one of the parties had a vendor's lien and the other had a mortgage security on the same piece of property that were related in such way that their equities were apparently equal. The vendor's lien being prior in time it was claimed that it should prevail but the court held that there were other equities upon which the case might be decided and therefore the maxim did not apply in the case. The case is a good one for illustrating the meaning of the maxim. Let us take another case, suppose there are several successive mortgages given upon a piece of property, the mortgagee of the last mortgage not knowing of the existence of the first, neither being recorded. Under those circumstances the equitable interests of the parties are identical and the equities are equal and neither has a better title than the other unless the older equity prevail because the equities are in all other respects equal, the only difference is that one has secured his mortgage first and in that case the older equity will prevail and the maxim applies.

(Dictation)

This maxim as commonly given in the books fails to express fully its true meaning. A court of equity will never decide a case upon the principle of priority of time gives the better right where there is any other principle upon which it can rest its decision. Priority of



time gives the better right in equity cases only when the equities of the parties are in all other respects equal. A better wording for the maxim would be the following: As between persons having only equitable interests, if the interests are in all other respects equal, priority of time gives the better right.

Pice vs. Pice. (Illustrative Case page 13, )  
(Study this case carefully)

Perry vs. Mutual Insurance Co., 3 Johnson N.Y. 303.  
That is a case of several successive mortgages upon the same piece of land.

The next maxim is as follows:

#### 4. WHERE THERE IS EQUAL EQUITIES THE LAW MUST PREVAIL

The meaning of this maxim can be made clear by illustration. Let us suppose A and B each to have equal equitable interests in a certain piece of real estate, while thus situated each is equally entitled to the aid and protection of a court of equity. But A also obtains the legal title to the property, now he has the equitable interest and the legal title. The equitable interest are equal but A having the legal title must prevail, for where there are equal equities the law must prevail. Another illustration is, where a purchaser of property buys it for a valuable consideration without notice of prior equitable rights, as a general rule he gets the legal title and also the equitable title, the equities of the two parties are equal but the purchaser has the legal title and the law under those circumstances will prevail.

(Dictation)

The meaning of this maxim is that where two parties each has an equitable interest in a piece of property, their equities being equal and one of these parties gets the legal title thereto, the one getting the legal title must prevail. The equities being equal there is nothing in the case upon which a court of equity can act and the parties therefore will be turned over to the law courts.

Economy Savings Bank v. Gordon (Illustrative cases page 19)

Also reported in 45 Atl. 176; 90 Maryland 486.  
Pomroy Equity, par. 767.

The next of the maxims which is the fifth is as follows:--

#### HE WHO SEEKS EQUITY MUST DO EQUITY.

The principle embodied in this maxim is of very frequent application. The meaning of the maxim is this, a court of equity will not confer aid upon a party seeking relief unless such party is willing to do what is equitable and just in regard to the other party to the controversy. A court of equity in giving relief to a complainant in a suit in equity will do so only upon the terms that the complainant consent to give such corresponding rights to the defendant as he may be entitled to regarding the subject matter of the suit. It is by virtue of the principle of this maxim that a court of equity can render a conditional decree. Almost every decree is conditional in its nature





where the controversy is at all complicated. The equity court will look over the whole case and distribute equity equally among the parties. But please remember that the application of the principle of this maxim does not justify a court of equity in imposing arbitrary conditions. The court will not go outside of its settled principles. The conditions imposed must be immediately connected with the subject matter in dispute before the court. I desire you to notice particularly that the equitable rights of the defendant that are to be conceded by the complainant as a condition to the granting of relief must be such as grow out of the subject matter of the suit.

(Dictation)

The principle of this maxim applies whenever a conditional decree is rendered. A court of equity will never grant relief to a party except upon his doing what is equitable as regards the other party to the controversy. But arbitrary conditions cannot be imposed. The court will not go outside of its settled principles. The conditions imposed must be immediately connected with the controversy before the court.

Comstock vs. Johnson. 46 N.Y. 645.

(Illustrative Cases, page 76)

A court of equity will apply this maxim in favor of the defendant against the complainant just as it will apply it in favor of complainant against the defendant where the exigencies of the case require relief be given to the defendant. Under the Code System of procedure and in the system of some of the states having separate law and equity tribunals the defendant in a suit may interpose an affirmative defence, for example suppose a mortgage is sought to be foreclosed against a party and he desires to plead a payment and release of the mortgage, under the old system he would have to file a cross bill in order to get relief. But the practice in that respect has been changed in many jurisdiction by statute and rules of court and permit a defendant to set up an affirmative case in his answer to be used as a defense and as an affirmative relief. In this particular case this maxim would apply in favor of the defendant. The defendant is entitled to affirmative relief but the court will not grant him a decree unless he does what in equity and justice he ought to do in favor of the complainant.

A great many illustrations of the application of this maxim are scattered through the books and I will give you a few illustrations in order that you may better understand the use and application of this maxim.

The case of a borrower of money at a usurious rate of interest coming into court and asking to have the transaction set aside by a court of equity. He can get this transaction set aside if there is a law against usury, but he could do so only upon his offering to do what is just and equitable towards the defendant, that is to pay back to him the principal with legal interest.,

Another case is where a man has taken an instrument



from another that is usurious in some particular, but the instrument is one that is not perfect in all its parts and the rights of the party taking the instrument are not in all respects protected, and he goes into a court of equity and asks for a reformation of the instrument. The court will grant a decree for the reformation of the instrument only on condition that he do what is just and right towards the other party, namely eliminate from the instrument its usurious character.

Another case is a bill filed in equity to redeem from a mortgage which is past due. Now a bill to redeem always necessitates the application of this maxim. A court of equity will not grant the right to redeem except upon the condition that the complainant do towards the defendant what is equitable and just, namely paying to defendant the debt actually due and interest up to the time of the hearing and legal costs.

Brown, Bonnell & Co., v. Lake Superior Iron Co.

(Illustrative cases page 27)

Also reported in 134 U.S. 530; 10 Superior Ct. 604.

I would like to have you study these two cases above cited as they illustrate the application of this maxim.

The sixth maxim is as follows:

HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.

This is the form that it is usually given in. Sometimes you will find it given in this form, "He that hath committed iniquity shall not have equity." The last two maxims are not expressions of any particular doctrine of equity jurisdiction. They simply embody principles that regulate or limit the jurisdiction of the court of equity. These two maxims are alike in this respect but differ in another which I will mention. Where the first maxim applies the party seeking relief may have relief if he is willing to do what is equitable and just towards the other party. It may appear to the court that the party seeking relief has not done equity at the time of the filing of his bill but still he may be given a decree if he is willing to do what is equitable and just towards the other party. But in the case where the last maxim applies ("He who comes into equity must come with clean hands.") the doors of equity are closed at once against the party who comes before the tribunal with unclean hands. He is condemned for his previous course. The court will not say, clean up your record and promise to do what is equitable and just and you shall have relief, but says, you have committed iniquity and you shall not have equity. If it appears from the bill of complaint that he has committed iniquity you may demur to the bill and have the case thrown out of court. If it appears during the course of the proof that he has committed iniquity, the doors of equity will be closed against him, in other words he will not be awarded relief under those circumstances.

(Dictation)

The last two maxims embody principles that regulate the jurisdiction of the court of equity, they do not embody any general equitable principle. They are alike in this particular but differ in another, namely, where the first



maxim applies the court will enter a decree directing that justice and equity be done to the other party thereto before the decree can become effective. Where the second maxim applies the decree of the court must always be a dismissal of the case of the party who has committed iniquity.

Let me suggest that in the application of the principle of this maxim, the iniquity must be of the transaction that is before the court and not as regards some independent transaction.

Bleakley's Appeal. (Illustrative cases page 30.)  
(66 Pa. St. 187.)

Kahn vs. Walton (Illustrative cases page 31)  
(20 N.E. 203; 46 Ohio St. 195)

As an example of the application of this maxim, let us suppose a party by taking undue advantage, and by unfair means obtains a contract, which is unfair and unconscionable that the party from whom it is obtained be required to perform it. If he seeks to enforce its permanence in a court of equity his prayer will be denied because he has committed iniquity in obtaining the contract.

Plummer vs. Nepler (26 N.J. Equity 481.)  
Snell vs. Mitchel (65 Maine 48-50.)

When it appears that a party seeking the aid of equity has tainted his claim with fraud, the relief will be denied. The case of Overton v. Bannister 3 Hare 503 Eng. Chancery is an illustration of the application of this maxim under such circumstances. A minor applied to his trustees for the transfer of certain property which they held for him representing to them that he was of age and therefore competent to enter into negotiations for the transfer of the property. He looked to be of age, and the trustees made what they thought to be proper investigation to find out if he was and made the transfer to him. As a matter of fact he was still a minor and when he had wasted the value of the property he then turned around and brought suit asking the court to compel the trustees to account for the property that they had transferred to him while he was a minor. The court said to him you cannot do that, you do not come into equity with clean hands.

A party wrongfully altered a written instrument and went into a court of equity and sought to get a decree for the reformation of the instrument. The court said you did wrong in altering the instrument without the consent of the other party and under those circumstances you are not entitled to relief.

Another illustration is found in the case of an insolvent who transfers property to some friend in order to escape the demands of his creditors. He afterwards compromises with his creditors, so that he deems it safe to take the title again in his own name. He goes to his friend and asks him to transfer it back, the friend says you own no interest in the property, you transferred it to me and I propose to hold it. The party will say You paid me no consideration for it and were only to hold it for a certain purpose. He then goes into a court of equity and seeks to have the property conveyed back to him and sets up the facts that the property really belongs to him, but the court says the purpose of the transfer was an iniquitous one and for the



purpose of defrauding your creditors and the court will leave you just where you are. There may be sometimes cases where it is justifiable for a person to put his property out of his hands to escape the demands of creditors. And it may be necessary for him to go to a court of equity in order to get his property back, if he can show that his course was justifiable under the circumstances, and that the claim was an unjust one, and that it was just and equitable that the property be placed so that it could not be embarrassed by the creditor, the court will grant relief. I have in mind a case where the plaintiff was seeking to get back property that he had conveyed to his brother in law. He had put the property in the hands of his brother in law in order to escape the demands of certain creditors. The claim was an unjust one and the creditors were seeking to embarrass him in his business. The claim was afterwards compromised and the brother in law decided to keep the property. He, the plaintiff sought to recover back his property in a court of equity, and by his proof showed that he was justified in his course and the court said that the maxim did not apply.

Another example is where several parties joined themselves together for the purpose of perpetrating a fraud with the understanding that each is to share in the profits of the venture. One party gets all the profits and refuses to divide. The others seek to force him to share up the profits in a court of equity. In such a case equity will not grant relief but leave the parties where they find themselves.

7. EQUITY AIDS THE VIGILANT NOT THOSE WHO SLUMBER ON THEIR RIGHTS.

In other words delay defeats equity.

---c0c--- Oct. 25rd 1902.





## INTELLIGENCE.

--0--

We had reached the seventh maxim in our discussion. The seventh maxim is usually given in this form, "Equity aids the vigilant, not those who slumber on their rights." Sometimes it is given in this form, "Delay defeats equity." This maxim needs no special explanation for its meaning is plain. Equity always refuses to enforce stale demands. If the Statute of Limitations has run against the demand, even though the statute does not in terms refer to equitable interests, equity will consider the matter stale. A matter may be regarded as stale in equity even though the Statute of Limitations has not run against it, especially where third parties have acquired interests in the subject matter of the litigation. The Statute of Limitations is a guide for the court of equity, but it is not always the deciding feature in the case for the demand may be stale even if not barred by the Statute of Limitations, if all the facts of the case indicate that equity and justice require that the demand should not be enforced on account of its age.

(Dictation)

"Equity always refuses to enforce stale demands. If the Statute of Limitations has run against a demand, then it will not be enforced by a court of equity, and in many cases it will not be enforced even though the statute has not run against the claim. Such will be the result if in the judgment of the court the demand has become stale as that term is understood in equity.

(Peigle vs. Henrioli (Illustrative Cases page 15.)

(120 U.S. 377; 7 Sup. Ct. 310.)

The application of this maxim is very well illustrated in this case.

Pomeroy Eq. Vol. 1, par. 49.

As you get on in this subject you will realize that equity very frequently acts or does not act according to its discretion. There are very many cases where it is discretionary with a court of equity to give relief or not give relief, take the matter of specific performance for example. It is always said to be discretionary with a court of equity to grant the decree for specific performance or refuse it. There are a great many other cases where a decree from the court is entirely discretionary, no positive rule or principle of equity require it. In cases of this kind a court of equity will not exercise its discretion in favor of a party who is guilty of laches. The pleadings must show that there has been no laches on the part of the party claiming relief. But if it does appear from the pleadings that the party seeking relief has been guilty of laches then such laches must be fully explained before the party can have relief. When they are explained they cease to be laches from the equitable point of view.



(Dictation)

Wherever the action of a court of equity is governed by discretion, the party seeking the aid of the court must never be guilty of laches, for if he has been the court will not exercise its discretion in his favor until the laches have been fully explained.

As a closing suggestion in regard to this maxim I wish to call your attention to an important equitable principle, a principle that includes not only the principle of this maxim but the principle of the two preceding ones, namely "He who seeks equity must do equity", "He who comes into equity must come with clean hands," and "Equity aids the vigilant, not those who slumber on their rights. The principle is this, that nothing can call a court of equity into activity but conscience ("He who seeks equity must do equity"), good faith ("He who comes into a court of equity must come with clean hands"), and reasonable diligence ("Equity aids the vigilant, not those who slumber on their rights").

(Dictation)

Nothing can call a court of equity into activity but conscience, good faith and reasonable diligence.

Smith vs. Clay (3 Brown Chancery 636)

The eighth general maxim is as follows:

## 8. EQUALITY IS EQUITY.

The maxim is sometimes put in this form, "Equity delighteth in equality." The notion of equality or impartiality is a fundamental one in equity jurisdiction. It lay at the foundation of the equity of the Roman Jurists and was incorporated in the English system from the outset. The principle embodied in this maxim is the foundation of the doctrine of pro rata distribution and contribution. This doctrine is not exclusively recognized by equity but in modern times has been adopted by courts of law. Where several persons are entitled to a participation in one fund equity will award a distribution of that fund pro rata among the parties according to the principle of this maxim. A Court of equity can do this only when the subject matter comes within its jurisdiction. The law formerly entirely disregarded this idea of pro rata distribution, but gave to certain claims or classes or types of claims precedence over other claims in the distribution of the funds. This precedence was due to the form of the security of a claim, thus a claim on a bond was given precedence over a claim evidenced by a simple contract. That was the condition until equity began to react upon the law.

(Dictation)

The notion of equality is a fundamental one in equity jurisdiction. It lay at the basis of the Roman Equity System and has always been a characteristic feature of our own equity system. The principle embodied in this maxim is at the foundation of the following equitable doctrines:



First: The doctrine of pro rata distribution, by which a fund will always be distributed equally by equity among those who are entitled to it.

Second: The doctrine of contribution, which I may illustrate by suggesting that when a creditor has a single demand against several parties he may by law enforce his demand entirely from any one of them. The law will not compel him to satisfy his claim by obtaining equal amounts from each of the debtors, but a court of equity acting upon the principle of this maxim will, if it gets possession of the controversy, proceed to equalize the burden. If the whole demand has been obtained from only one of the parties liable, equity will enable that party to obtain his contributory share from the other parties. This doctrine originated in equity and for a long time was peculiar to equity courts. At the present time, probably in all of the states, certainly in this state, contribution may be enforced on the law side of the court, but it is because equity has reacted upon the law.

Contribution is a doctrine by which one who has been compelled to pay more than his just share of a demand may proceed against others who are liable with himself for equal contribution.

*Mwker vs. Moore* (Illustrative cases page 17)

(20 N. E. 848; 40 N. Va. 49)

This case discusses the extent to which the law courts have adopted the principle of this doctrine.

*Romeroy* 7q. vol. 1, par. 406-7.

Another illustration of this maxim and its influence upon the law courts is found in the illustration we find in the ownership of land in common and joint tenancy. One of the characteristics of joint tenancy is the principle of survivorship. A principle by which upon the death of one of the tenants his entire interest passes to the surviving tenant instead of going to his heirs or personal representatives. It is not equitable and just that a person's property so situated should pass to a stranger rather than to those connected to him by natural ties. When a court of equity gets hold of a case where there is a question whether it was the intention of the parties to create a joint tenancy or a tenancy in common, will construe their intention so as to make it a tenancy in common rather than a joint tenancy. The influence of the equity courts have been felt by the law courts and of late the tendency of the law courts has been in the same direction. Statutes have been passed in the different states to the effect that where a conveyance of land is made to two or more parties without anything being said in the conveyance as to how they should hold the land, they will be considered as holding as tenants in common and not as joint tenants. The common law rule was that where there was a conveyance to two or more parties of an interest in lands without anything being said in the conveyance as to how they should hold



that they should hold as joint tenants.

(Dictation)

Another illustration of the application of this maxim and its influence is seen in the change that has come about in regard to joint tenancies.

The next and ninth maxim is as follows:

#### 9. EQUITY REGARDS THAT AS DONE WHICH OUGHT TO BE DONE.

This is the ordinary form in which the maxim is given. Pomeroy, however, adopts this form, "Equity regards that as done and treats that as done which ought to be done."

Pomeroy No. 1, par. 384.

The principle of this maxim lies at the foundation of that part of equity jurisprudence which has to do with equitable property. Without the application of this maxim it would in most cases be almost impossible for us to have property in equity.

The meaning of this maxim can be gathered from illustration. Equity will consider that property has assumed a certain form which in justice and equity it ought to stand. Thus if it has been imperatively directed in a will that land shall be sold and turned into money, equity will consider that this has been done. The subsequent devolution of the property will be governed by the laws that govern personal property and not real estate. Here real estate is treated in equity as personal property. A constructive change in the character of property has been brought about. This is what is called the doctrine of equitable conversion. Wherever the situation is such that equity and justice require it, the character of the property may be at once changed. I have given you an illustration, I will now give you a statement of the doctrine and its operation that is general in form and will put it in this way, where money is directed to be applied in the purchase of land or land is directed to be sold and turned into money, each thereafter is in equity considered as that species of property into which it has been directed it should be converted, this direction may be by will, by contract, by marriage settlement, or in any legal way.

(Dictation)

The principle of this maxim really lies at the foundation of equity property interests and at the basis of the doctrine of equitable conversion. A doctrine by which equity under certain circumstances will change the character of property although no change has actually taken place. The doctrine may be stated thus, where money is directed to be applied in the purchase of land, or land is directed to be sold and turned into money, each thereafter is in equity considered as that species of property into which it has been directed it should be converted, this direction may be by contract, by will, by marriage settlement, indeed, in any legal way.





Wright vs. Fort Dearborn (Illustrative Cases page 43)

(1 F. 2d, page 84; 129 Ill. 39)

Grati vs. Leslie 3 The ton 357.

(Illustrative cases page 38)

This is a very striking case showing the application of this principle. An alien residing in this country by his will directs that certain lands be sold and turned into personalty and the proceeds of the same be given to another alien named in the instrument. The instrument directed that the executor sell the land and to pay the proceeds to the beneficiary named in the will. Now under the law he could not devise real estate being an alien but he could bequeath personalty and this doctrine of equitable conversion came in to save the devise of real estate to the legatee. The court held that the principle of equitable conversion applied, and that the real property was at once changed into personalty on the death of the testator by force of the provision in the will that the property should be sold and the proceeds paid to the legatee.

Ames vs. Richardson, 25 Minn. 330; 13 F.W. 137;

5 Min. 315.

Pomeroy Eq. 1. 1, page 371.

Dispham's Principles of Equity 307.

A further illustration of the doctrine of equitable conversion is found in the case of contract to sell and purchase land. A enters into a contract by which he agrees to sell and convey to B a certain piece of land and B agrees to pay for the land at a certain time in the future. At law A still continues to be the owner of the land, only person who has any interest in the land that a court of law would recognize, and B still continues to be the owner of the purchase money that he has agreed to pay for the land, only one court of law would recognize as having any title to the money. But equity regards that as done which should be done. Now A must convey this property to B upon the payment of the purchase price. On the payment of the money it is his duty to convey, and he should convey. In equity B is regarded as having really paid the money that he has promised to pay. Equity regards that as done which should be done. If B is considered to have done what in equity and good conscience he should do, then A will be regarded as holding the land in trust for B. Upon the execution of such a contract for the sale of land, the vendor becomes at once a trustee of the property for the vendee, and the vendee becomes at once a trustee of the purchase money for the benefit of the vendor by virtue of the maxim, equity regards that as done which ought to be done.

(Dictation)

Another illustration of the application of this maxim is found in contracts for the sale or conveyance of realty.

(cont'd in next lect) Oct. 24th 1902.



## LECTURE XI.

-----000-----

(Cont'd from Lect. X.)

Here upon the execution of such a contract the vendor becomes at once a trustee of the property for the vendee and the vendee becomes at once a trustee of the purchase money for the vendor. Here is a case of equitable conversion by virtue of the principle of the maxim, equity regards that as done which ought to be done. The principle of this maxim underlies the entire doctrine of trusts (not speaking of modern trusts but trusts as understood in equity).

Howard vs. Murphy (22 N.J. Equity 531)  
Pomeroy's Equity Juris. 376.

-----

I will now take up the discussion of the tenth general maxim. It is usually given in the following form:

## 10. EQUITY LOOKS TO THE INTENT RATHER THAN TO THE FORM.

The principle of this maxim is now recognized very largely by courts of law.

Dictation.

Equity will never permit mere form to hide the true bearings of a transaction.

The recognition of the principle of this maxim in courts of law is one of the results of the gradual adoption by these courts of equitable principles. I should suggest that this maxim and the one last mentioned have between them an inseparable connection. To use the words of Pomeroy, "It is only by looking at the intent rather than the form that equity is able to treat that as done which in good conscience ought to be done." This maxim and the last are inseparably connected and are always applied together.

Pomeroy's Equity Jurisprudence par. 378.

I will give you some illustrations of the application of the principle of this maxim. It is only possible through the application of the principles of this maxim and the one last mentioned to have property in equity. In law title to property can only exist in a person by means of acts and forms. At the present time real property is transferred and a title created that is recognized in law, by means of the deed, signed, sealed and delivered. By the performance of those external acts peremptorily required by law a title is developed in the grantee that is the only title recognized at law. This is so even if it is the intention of both parties that the estate shall be



held by one for the benefit of another. If the deed is absolute on its face he holds it for his own benefit, and evidence could not be introduced in a court of law to show that the parties intended that he should hold it for the benefit of another. But this is very different in a court of equity. Equity in obedience to the principle of this maxim, will brush aside the form and look at the intent of the transaction. And if it appears that the intention of the parties was that one should hold for the benefit of another, it will vest the equitable title in the beneficiary.

Dictation.

It is only by disregarding form and considering the intention of the parties that property in equity is possible in many cases.

Pomeroy Eq. Juris. 380.

I can illustrate the principle of this maxim also by referring to the doctrine of penalties and forfeitures, the attitude which equity takes towards penalties and forfeitures. A penalty is a clause introduced in an instrument that provides that the party executing the instrument in case he fails to perform certain agreements in the instrument, imposes upon him the payment of a certain sum of money. A forfeiture is a clause inserted in an instrument by which he agrees to forfeit certain property interest in case he fails to perform certain agreements in the instrument. Penalties we usually find in instrument in the nature of bonds. A penalty is usually larger than the amount involved in the transaction, usually twice as large as the amount. In form the party agrees to pay the penalty if he fails to keep the covenants in the instrument and at law he would be compelled to pay the penalty. That is according to strict adherence to legal principles but equitable principles have had their effect upon law courts and in modern times the rules of law are not so strictly applied in regard to penalties as formerly. A court of equity looks at the intention of the parties in construing an instrument. What is the intent of the parties in inserting a penalty in an instrument? Their intention is that the penalty may serve as a security for the performance of the obligations of the instrument. If the obligation is not performed and damages are an adequate compensation to the other party, and damages are paid, the full effect of the security is obtained. If the party who has thus obligated himself is willing to compensate in damages the other party, when the case is one that can be settled by damages, in that case a penalty will not be enforced in equity.

Dictation.

Another application of the principle of this maxim is seen in the doctrine regarding penalties and forfeitures. Equity looks at the intent of the parties in insert-



ing the penalty or forfeiture. The real intent is that it may operate as a security. Relief will never be given upon a penalty or forfeiture wherever the actual damages sustained can be adequately compensated. Equity will never enforce a penalty or forfeiture.

Pomeroy Eq. Juris. Vol. 1, 361.

34 Mich. 138.

Another illustration of the application of this maxim is found in the mortgagor's equity of redemption. According to strict form if the mortgagor fails to pay upon the day stipulated, the estate becomes absolute in the mortgagee. The Common law mortgage is an estate in fee simple upon the happening of a condition subsequent. After failure to perform the condition of the mortgage, at law the mortgagor had no further right in the estate, but a court of equity furnishes relief under such circumstances. It will brush aside the mere form of the instrument and look to the intent of the parties. What was the intent? It was that the mortgage should operate as a security for the payment of the debt. Equity says that the mortgagor shall have an opportunity within a reasonable time to redeem his property by payment of the debt for which the mortgage was given.

Dictation.

Another illustration of the application of the principle of this maxim is found in the mortgagor's Equity of Redemption.

Pomeroy Eq. Juris. par. 382.

Perhaps a more striking illustration of the principle of this maxim is found in the principle that equity will regard an absolute deed as a mortgage where it is the intention of the parties that it should operate as a mortgage. If I come to you and wish to borrow some money and say that I will give you as security for that loan a deed to a certain lot. The agreement that you are to hold the title to that lot as security for the payment of the loan at some future time. The deed on its face is an absolute one and at law you would be the absolute owner of the lot. Evidence would not be admitted to show that a deed absolute upon its face was to be regarded as a mortgage between the parties. Courts of law will recognize at the present time that a deed absolute on its face may be held to be a mortgage between the parties but it will not enforce the deed as a mortgage, they leave that to a court of equity. A court of equity in obedience to the principle of this maxim will receive evidence showing that the real transaction was between the parties without respect to the form of the instrument, if the parties intended the deed should be only a security for a deed equity will so regard it and so enforce it. In a court of equity a grantee in a deed of that kind must go through a proceeding similar to a foreclosure proceeding before the absolute title will vest in the grantee. The title must be based upon a decree of the court if it is to be one that will stand both





in law and equity. The reason being that the instrument is really not a deed but a mortgage.

Dictation.

Another illustration is found in the holding of courts of equity in regard to an absolute deed that is intended by the parties to be a mortgage. In equity this intent may always be shown and the absolute deed,

by a decree of the court turned into a mortgage.

Stinchfield vs. Milliken. (Illustrative case 46)

(71 Maine 567)

The eleventh maxim is in the following form:

# 11. EQUITY IMPUTES AN INTENT TO FULFILL AN OBLIGATION.

Dictation.

The meaning of the maxim is this, whenever a duty rests upon a party and he does something which may be construed as a performance of that duty, equity will presume that the act was done with the intent to perform the duty.

As an illustration let us take the case of property purchased by one occupying a trust or fiduciary relationship with trust funds. The money belongs to the trust estate, the party purchasing takes title in himself or in his own name. An example of this is an agent who purchases land with money belonging to his principal and takes the title in his own name. So far as the deed is concerned he is absolute owner of the property. Equity will look upon a transaction of that kind in this way, in obedience to the principle of this maxim it will assume that the agent intended to do his duty. What was his duty under the circumstances? It was to purchase that land and hold the title for the benefit of his principal. And equity says he does so hold it. Equity under such circumstances creates a trust, which is called a resulting trust in favor of the principal. A trust results in favor of the principal who furnished the consideration. The principle may be stated in a broader way, a trust always results, in the absence of statutes changing the law, in favor of the person who has furnished the consideration. If you can find the person who furnished the consideration in a transaction, you have found the person who is entitled to the equitable interest.

Dictation.

Illustration: A purchase by one acting in a trust capacity, like an agent, of property with trust funds, the person taking the title absolutely in himself. Equity will assume that he holds the property for the benefit of his principal. A resulting trust is created.

McLarren vs. Brewer. (Illus. cases page 48)

(51 Me. 402)

It must always appear, however, directly and definitely that trust funds have been actually used in the



purchase of the property.

Ferris vs. Van Vleeten (Illus. cases page 453)  
(73 N.Y. 113)

The twelfth maxim is this:

## 12: EQUITY ACTS IN PERSONAM AND NOT IN REM.

The principle of this maxim was adopted by the Chancellors in the infancy of the equity system. It was a cardinal principle of equity that it should act in personam and not in rem. That it should take hold of the litigant and make him do what he ought to do. The decree of equity was originally most emphatically a personal decree. If the person refused to obey the decree of the court, the compulsory process of the court was brought to bear upon him, attachment was issued against him and he was brought into court and asked to purge himself of contempt in refusing to obey the decree of the court. By a long string of these processes a personal decree was in most cases effective, but there were many cases where a personal decree could not be carried out on account of the obstinacy of the litigant. Under such circumstances a court of equity was powerless. A decree in equity could not operate purely as a transfer, a decree simply by its own force could not vest the title to property in a certain person. If a court of equity failed to make one party make a conveyance of the title to another it could not make the decree stand in place of a conveyance, if a defendant refused to obey the command of the court it could only compel obedience through its compulsory process. But in the United States this personal character of an equity decree has been greatly changed by statute. There has been two kinds of legislation upon this subject. The first provides that the decree itself or a duly certified copy thereof duly recorded shall answer as a transfer. The second kind of legislation on the subject provides for an execution of the decree by the Master in Chancery or other officer of the court of equity, with the same effect as if made by the defendant himself. In accordance with the decree the Circuit Court Commissioner or Master of Chancery makes a sale of the property and makes a deed to the purchaser. The statutory changes that have been made in regard to the principle involved in this maxim, as a matter of fact tends to make equity act in rem instead of in personam.

### Dictation.

The principle of this maxim was strongly adhered to during the early history of the equity court. Equity could only act in personam. It was a fundamental principle that a court of equity had authority to compel a person to do what in equity and good conscience he ought to do. The personal decree was enforced if necessary through the compulsory processes of the court. In the United States this has been changed by statutes of two kinds. First, statutes that provide that the decree may operate as a conveyance.

First Mich. Compiled Laws 1897 (465)



Second, Statutes that provide for a conveyance by some officer of the court.

Pomeroy's Eq. Vol. 3 par. 1317 and note 2.

Although this fundamental doctrine that equity acts in personam has been limited by statute, you should still remember that this personal character of a decree in equity still remains where it has not been changed by statute and where ever such a change would be impossible, for example a decree restraining a defendant from doing a certain thing necessarily must be a personal decree. It is still personal where the subject matter of the decree is without the jurisdiction of the court, the parties being within the jurisdiction. Suppose for example I own land in Ohio and I contract with you to sell and convey you the piece of land and I fail to do so and you go into a court of equity in the state of Michigan and get a decree for the specific performance of that contract. In Michigan by force of statute the decree would operate as a conveyance of the property. But if I record the decree in Ohio, it is a mere nullity. Under these circumstances it would be a personal decree, it is not self executing. So whenever the subject matter of the controversy is outside the jurisdiction, the decree even with these statutes existing, is still a personal decree.

Dictation.

The decree in very many cases still remains a personal one as for example where the subject matter of the controversy is without the jurisdiction of the court, the parties being within the jurisdiction of the court.

Clements vs. Tillman (Illus. cases page 50)

5 S.E. 194; 79 Ga. 451)

Hart vs. Sansom (Illus. cases page 52)

(110 U.S. 151)

Pomeroy Eq. par. 134-135.

-----oOo-----

Oct. 30th, 1902.



## LECTURE VII.

---o---

The next and last maxim is usually given in the following form:

## 13: EQUITY ACTS SPECIFICALLY AND BY WAY OF COMPENSATION.

The principle of this maxim runs through the entire system of remedial equity. Equity very rarely grants relief in the form of damages for an injury. Under certain circumstances as I have already suggested a court of equity after it has once obtained jurisdiction of a case may retain jurisdiction of the case and give compensatory damages where equity and justice require that a judgment for damages be given, equity under those circumstances does not act specifically. The aim of equity is to determine and to declare estates, interests and rights of litigant parties and to compel parties to observe them, and to give parties what they are entitled to in specie rather than damages by way of compensation. Equity aims to prevent injuries that are threatened and to put a stop to injuries that are being inflicted and it works out its remedy not by way of compensation but by acting specifically. Herein we discover a characteristic difference between courts of law and courts of equity. A court of law always gives relief by compensation. If a party fails to carry out a contract, a court of law will give damages for the breach, while in a court of equity if he fails to carry out his contract, equity will specifically enforce the performance of the contract.

Dictation.

The aim of a court of equity, as a rule, is to declare rights and to compel parties to observe them. The equity court acts specifically in regard to the subject matter of the controversy and rarely gives damages as the main relief in a cause of action. If the court has once obtained jurisdiction of a matter it may retain the case if equity require it and give damages, but to give damages is not a primary function of the equity tribunal.

Pomeroy Eq. J. Vol. 1. par. 170 and par. 419.

Wheats, Principles of Equity par. 48.

Adams vs. Messenger (Illust. cases page 54)

(17 F.E. 491; 147 Mass. 185)

You will find in that case specific performance of a contract to convey personalty sought at the hands of the court. It was objected on the part of the defendant who demurred to the bill that a court of equity cannot specifically enforce a contract for the conveyance of personalty. It is the contention of the defendant in that case that the complainant had a full and complete remedy at law by a suit for damages. Defendants urged in support of their demurrer the principle embodied in the maxim, equity will not grant relief where there is an adequate relief in





an action at law. Contracts which relate to realty can necessarily only be satisfied by a conveyance of the particular estate contracted for, while those which relate to personalty are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market precisely similar property to that which he had agreed to purchase, so it is not necessary to come into a court of equity in order to get relief for a breach of a contract to convey personalty. That is the general rule, but the court held that the general rule did not apply in this particular case. If an article of personalty is one of rarity, if it is a work of art, or a heirloom, something that is not purchaseable in the general market, or bank, railway, or other corporation stock which is limited in amount and not ordinarily to be obtained on the open market, or if the article is one protected by patent and the manufacture of the article is limited, then a court of equity will specifically enforce the contract for the conveyance of such an article of personalty, and the particular article that was the subject matter of this contract was one that was not easily purchased upon the market and the court held the contract should be enforced.

I have devoted considerable time to the examination of these general maxims and to the discussion of the principles involved in the same. The general maxims of equity are of the highest importance, they are broad, comprehensive and fundamental, they permeate all parts of the equity system and are of constant application in equity tribunals. By getting a thorough understanding of these maxims now you will get a comprehensive notion of the equity system that will aid you in your further investigations of the subject. Upon the importance of these general maxims of equity see,

Pomeroy Eq. Juris. Vo. 1 par. 120.

We will now take up the discussion of the second division of the subject, namely, **EQUITABLE TITLES**. Sometimes instead of equitable titles, the term property in equity is used, but the terms are synonymous. Title or property in equity may exist in lands or chattels. An equitable title is a right in or to or over subject matter recognized and protected by equity.

Dictation.

**EQUITABLE TITLE IS A TITLE RECOGNIZED? PROTECTED AND ENFORCED ONLY IN A COURT OF EQUITY.** It should be distinguished from equitable rights which are simply rights to some one of the equitable remedies.

Whenever there is equitable property whether it be in personalty or in realty there must be two simultaneous ownerships present. The original title to the property under such circumstances is decomposed and separated into its two constituent elements, namely, equitable and legal title. You cannot have or conceive of equitable property without there is an outstanding legal title in some one else. If the two titles center in one and the same person a merger takes place and the equitable title is swallowed up in the legal title. That is the general rule, but under certain circumstances this rule is not enforced. A court of equity may keep the legal and equitable



titles separate even though the two are centered in one person in order that justice and equity may be done, and that the intentions of the parties may be carried out. But in the absence of any intention of the parties that the titles should remain separate, when the two titles are centered in one person the two titles will become merged and only the legal title remain.

#### Dictation.

In every case of equitable property we must have two simultaneous ownerships, usually in different persons, namely the legal ownership and the equitable ownership. The original title is decomposed and separated into its constituent elements. The two titles must as a rule be in different persons, and if the two titles center in the same person there is a merger and the legal title only remains, but where equity requires it the titles may be kept separate by a court of equity even though centered in the same person. Under some circumstances this may occur in order to carry out the intention of the parties.

Pomeroy's Eq. Juris. Vol. 2 par. 788.

Keep in mind this separation of the two estates as a characteristic of equitable estates or equitable property. It may be the intention of the parties that the equitable title be permanently separated and this is fundamental as being a characteristic of one kind of title or trust. For example if property is conveyed to A and by the terms of the conveyance A is bound to hold the property for the benefit of B for a certain time during his life, the legal title is in A and the equitable title is in B and it is the express intention of the parties that they be permanently separated. There is no element of hostility between the owner of the legal and the owner of the equitable title. That notion is the basis of one division or class of trusts, namely expressed trusts. All express trusts are due to the notion of the permanent separation of the legal and equitable estates or titles. But there are cases where equity will recognize and raise equitable titles where the separation of the two titles are not permanent but is transitory in its nature. Where there is an element of hostility between the legal and equitable owners of the title. Where it is the intention of the owner of the equitable title to put an end to the separation of the titles and to secure the legal title as soon as possible. The relation is antagonistic and not permanent but transitory. And these characteristics are found underlying another class of trust known as resulting or constructive trusts, trusts that the law implies from all the surrounding circumstances. It is not a permanent trust but one raised for the purpose of doing equity and justice between the parties. I gave you an illustration in the last lecture of an agent purchasing land with his principal's money and taking the title in his own name. The law will make the agent a trustee for the benefit of his principal, the one who furnished the purchase money, that is called a resulting trust and is based upon the maxim I gave you yesterday morning. But suppose the agent in disobedience to the directions of his principal purchases land with his principal's money and takes title in his own name for the purpose of cheating and defrauding his principal. Equity will say under those circumstances, you have the legal title but you have acquired it through fraud and you shall hold it in trust for the benefit of your principal. That is known as a constructive trust. Whenever fraud enters into a transaction and by means of the fraud



the legal title has got into the hands of a person who has no right to hold it, equity raises a constructive trust in favor of the party who paid the purchase money and on account of the fraud it is called a constructive trust. The separation is not a permanent one and it is not understood between the parties or by the court that it is to be permanent. The object of the party going into a court of equity is not to continue the relation but to put an end to it by compelling the party who has the legal title to convey it to him who holds the equitable title.

Dictation.

This separation of the legal and equitable titles may be permanent in its nature. It may be in accordance with the agreement of the parties there being no hostility between them. This is the case in all expressed trusts. It is in accordance with the agreement or instrument by which the trust is created that the relation shall be to a certain extent a permanent one. But the relation may be a temporary one, and there may be an element of hostility in it. This is always the case where the court raises a trust for the purpose of working out equity and justice where injustice has resulted from fraud or unfair dealings. In such a case the beneficial owner that has been wrongfully defrauded of his legal title seeks to put an end to the trust relation by compelling a conveyance to himself by the wrong doer of the legal title. All constructive trusts are of this kind.

Tomeroy Vol. 1, par. 146-147-148.

" Vol. 2 par. 1030-1040.

I will now discuss the nature and character of the separate equitable estate. It would be possible to treat all equitable estates within the single subject of trusts. Trusts are at the foundation of all equitable estates and interests. As all kinds of equitable property is so closely allied and connected with trusts it is well to learn and to know something of the origin and introduction of trusts into equity. It is not known exactly when the notion of the separation of the legal and equitable title first appeared in equity. When it first appeared the name trust was not given to it, it was called a use. It was not known as a trust until after the passage in the reign of Henry VIII of a statute known as the Statute of Uses and after the construction the courts put upon that statute. After that time the equitable interest was described as a trust, before that it was known as a use. It is almost impossible for us to tell just when the notion of double ownership first came into the English law but it is safe to say as early as the reign of Edward II.

Dictation.

Uses are trust came into the English law probably as early as the reign of Edward III(1337-1377). Uses were used and resorted to for the purposes of fraud. The Clergy



resorted to them for the purpose of escaping the affect of the Statute of Mortmain. The laity to defraud creditors and to escape from feudal burdens because many of the feudal obligations did not attach to equitable interests. During the reign of Henry V. the greater part of the land of England was held in this way.

Spence's Equity Jurisdiction Vol. 1 pages 39-44.

Pomeroy's Eq. Juris. Vol. 1 par. 151 and 978.

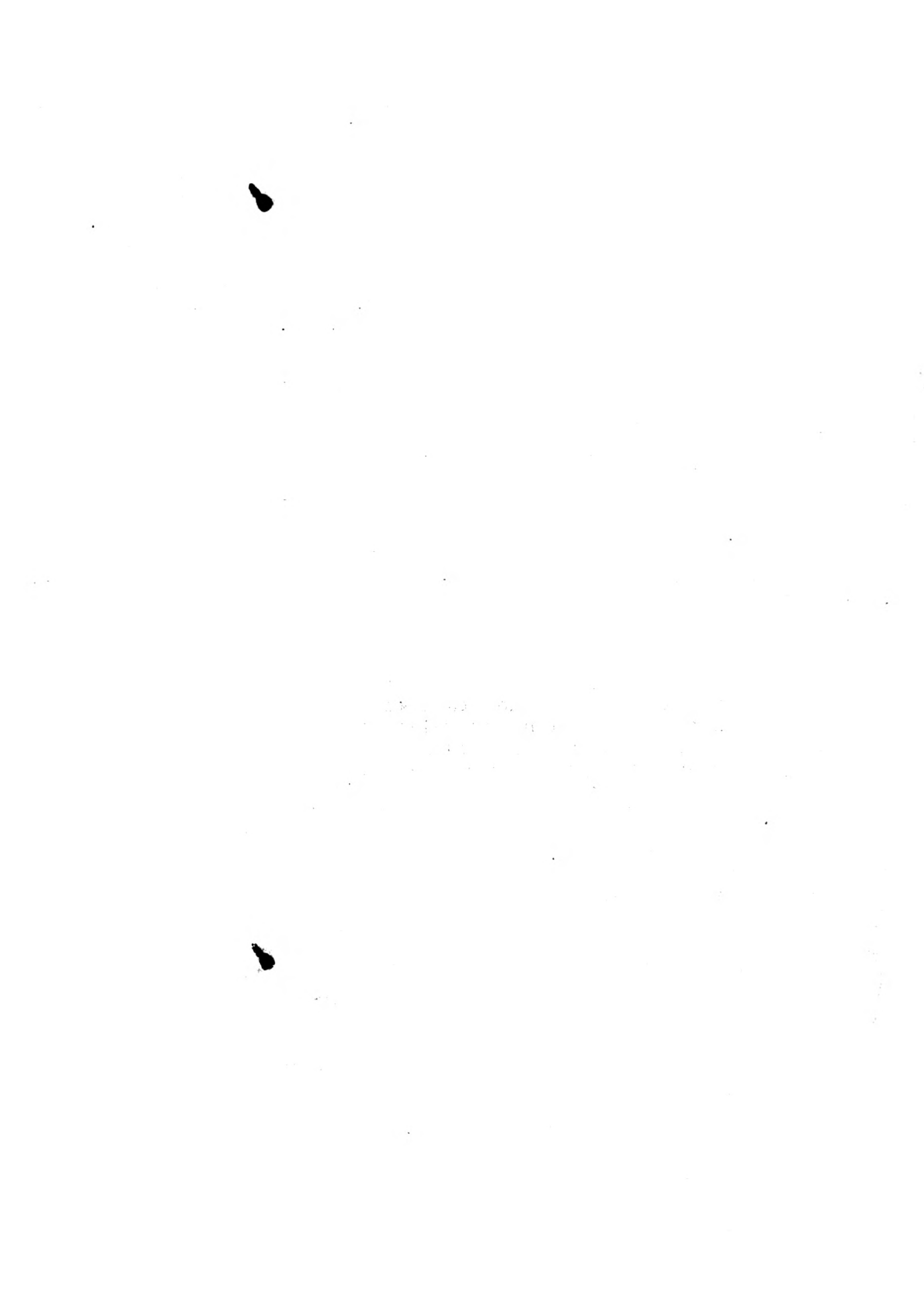
Bispham's Principles of Equity par. 51.

When uses first were introduced into English law there was no way by which the owner of the legal title could be compelled to perform his duty towards his beneficiary. It was simply a moral duty that existed in the holder of the legal title, he might perform or might not perform as he saw fit. In case of religious trust, undoubtedly, the power of the church operated to compel the party holding the legal title to carry out his duty towards his beneficiary the church. It was quite possible that the church influenced asserted itself in favor of the laity. It was a matter of conscience that the use should be observed by the holder of the legal title and it is possible that the power and influence of the church was interposed in compelling the performance and observance of this matter of conscience. It is well known that it interposed when the question was between the church and the holder of the legal title. It was not until the reign of Henry V that a court of equity began to take jurisdiction over the matter of uses and frequent application at this time to the court of equity were not common. During his reign application for relief in these matters were made to the Chancellor, who was usually of the Clergy and as the duty of performance was purely a moral one he was peculiarly fitted for trying and determining such questions. During the reigns of Henry VI and Edward IV the jurisdiction of equity over uses had become established and their existence had been recognized by the law courts. During the early times and before the passage of the Statute of Uses the equitable interest was known as a use. The party holding the legal title was known as the feoffee use and the party who held the equitable interest was called the Cestui Que Use. After the passage of the Statute of Uses the equitable interest was designated by the word trust and the holder of the legal title was called the trustee and the holder of the equitable interest was known as the Cestui Que Trust.

Dictation.

During the early history of uses there was no law by  
(cont'd in next lecture)

----- Oct. 31 1902.





## LECTURE XIII.

--0--

(cont'd from Lect. XIII.)

in which a use could be enforced. It constituted simply a moral obligation. Sometimes its enforcement was brought about by the interposition of the clergy, this was frequently the case where the use was in regard to property devoted to the church. During the reign of Henry V. the court of equity began to take jurisdiction, but frequent application to the court at this time were not common.

-----

I suggested at the close of the last lecture that when uses were first introduced in England there were no courts in which they were enforced. The courts of law did not take cognizance of them because courts of law only took cognizance of legal estates and courts of equity when they were first introduced did not exercise jurisdiction over them. The only remedy that the party had was the remedy that was secured to him to a certain extent through ecclesiastical interference, which was particularly the case where the use was in favor of a religious body. And undoubtedly the ecclesiastics interefered frequently and secured the performance of the use where it was in favor of a private person. The use was particularly a matter of conscience and it is only natural for us to suppose that being a matter of conscience it appealed to the ecclesiastics and they frequently interefered. It was not until the reign of Henry V. that courts of equity began to take cognizance of uses. It was not until the subsequent raings of Henry VI and Edward IV. that all cases pertaining to uses became fixed and established as a matter of pure equity jurisdiction and courts of law came to recognize the fact that equity would take jurisdiction over the use and enforce it. It is not necessary for me to describe in detail the several statutes in regard to uses that were passed prior to the passage of the Statute of Uses. There were several statutes passed, their object being the regulation rather than the extirpation of uses. You will find them fully described by Spence and you will find them referred to by Bispham in his work on equity.

## Dictation.

As to the legislation concerning uses passed previous to the Statute of Uses, see Spence's Equitable Jurisdiction, pages 461, 462. and Bispham's Principles of Equity pages 75-76. It was not the purpose of this legislation to destroy uses but simply to regulate them in certain particulars.

It was not until the Reign of Henry VIII. that any legislative attempt was made to destroy the use. The practice of conveying estates to one person for the use of another had become so general at that time as to give rise to much that was prejudicial on account of the secrecy that might be given to such conveyances. Thus purchasers were often de rauded out of their purchase money. Land would be conveyed to a person not



knowing of the outstanding equity against it and find that their title was clouded by an interest that equity would recognize and enforce against it. It also became a means of escape to dishonest debtors. An ordinary legal execution could not be levied against an equitable interest. All a debtor had to do in order to escape liability on execution was to put the legal estate out of his hands and retain the use. Even to-day this method is resorted to by debtors to escape liability upon their obligations but it is more difficult for a debtor to escape liability in this way on his obligation than it formerly was because execution may by statute be levied on equitable interests. Uses were also resorted to for the purpose of escaping certain feudal burdens. Certain of the feudal burdens would not attach to ~~family~~ ~~xxxx~~ equitable estates and interests. These three difficulties growing out of uses were felt particularly among the higher classes and served to condemn uses. The king felt that he was being deprived of many of his feudal rights by the conveying of land to the use of another for the purpose of escaping the feudal burdens that attached to the legal estate. The king found in his nobility sympathetic supporters in his plan to do away with the injury or supposed injury growing out of uses and the celebrated Statute of Uses was enacted by Parliament in the twenty ninth year of the reign of Henry VIII. The king and his sympathizers supposed that this statute would do away with uses altogether. The preamble of the statute is broad and condemns in terms and recites the evils that have resulted from uses at great length and a person would think from a reading of the preamble that the enacting clause would be of a form that would wipe out of existence uses entirely, but when we come to the enacting clause we find it brief and narrow in its scope and in substance enacts that where any person or persons shall be seized of any lands or other hereditaments to the use of any other person or persons, then the person or persons to whom the use is limited shall be deemed to be in legal seizin and possession of the land. The statute does not forbid uses but assumes that they will continue to exist as before. This was probably designed for the statute was framed by men learned in the law and who would naturally know what the result of such a statute would be.

#### Dictation.

On account of the extensive holding of land to the use of another many grievances arose. The secrecy of the uses resulted in the defrauding of purchasers, also through uses debtors frequently escaped from obligations, and through them also many feudal burdens were avoided. These injuries led the King and the Nobility to insist upon the enactment of the Statute of Uses, passed in the 29 year of the reign of Henry VIII. The apparent purpose of the statute was to do away with uses. The weakness of the statute consisted in the narrowness of the enacting clause which was so framed as to permit uses. Its wording assumed that uses



would continue to exist.

The enacting clause assumes by its wording that uses under certain circumstances will continue to exist. It says that where any person shall stand seized of any lands or other hereditaments to the use, confidence or trust for any other person or persons, the person or persons that have such use or confidence or trust, that is the person beneficially entitled to it, shall be deemed in law to be seized and possessed of the same lands and hereditaments. The language of the statute contemplates that a person can be so seized and simply turns the use into a legal estate. To illustrate the working of the statute let us suppose a feoffment is made to A and by the terms of the conveyance he is put in possession of the lands to hold for the benefit of B. Before the passage of the Statute of Uses A would hold the legal title and B holds the equitable interest. A's title can only be enforced and protected in a court of law and B's title can only be protected and enforced in a court of equity. The Statute of Uses says that when a person shall be seized of land to the use of another then that other person shall be deemed to be in the legal seizin and possession of the same. The other person becomes the legal owner of the property and there is no equitable interest left because both the legal and equitable title vest in B by force of the statute and the legal and equitable title become merged in the legal title. Wherever the statute applies it has the effect of turning the equitable interest into a legal interest.

Dictation.

The Statute of Uses enacts in substance that where any persons shall be seized of any lands or other hereditaments to the use of any other person or persons, then the person or persons to whom the use is limited shall be deemed to be in the legal seizin and possession of the land. (This is not the exact words of the statute, it is abbreviated very much, but it is the substance of it). The effect of the statute where it applies is to turn the equitable interest into a legal interest.

Pomeroy's Equity. Vol. 2 par. 983.

Spence Equity Jurisdiction. Vol. 1, pages 463-4.

Story Equity Juris. Vol. 2 par. 970.

The Statute of Uses instead of exterminating uses and confidences as the King and the nobility expected that it would acted rather as a stimulus to the system. The failure of the statute in accomplishing its primary purpose was due to both the narrowness of the statute itself and the narrow and strict construction given to it by both the law and equity courts. The statute by its terms extended only to uses in lands, tenements and hereditaments and did not apply to uses in personal property. By the construction of the courts its operation was limited to cases where the owner of the legal title had a free hold estate. You cannot be seized of an estate for years because it is personalty, the smallest estate that can be seized is a freehold estate.



## Dictation.

Statute was narrow and limited in its terms and applied only to freehold interests.

Under this construction if a term for years was held by one person to the use of another the statute did not operate and the legal and equitable estate remained separate and distinct. If a man held a term for one hundred years and conveyed that term to another person to hold for the benefit of a third person the statute under those circumstances would not apply because there was no seizin for it is not a freehold interest. But the person holding the freehold interest may by virtue of the statute hold it for the benefit of another person for a limited time, under those circumstances the statute would apply. It was held that where the feoffee to use, that is the trustee was to convey the land or collect the rents and profits arising therefrom and pay it over to the beneficiary of the estate the statute did not apply in such cases. The use was not executed and it was held that the legal estate remained in the feoffee in order to enable him to perform the trust. It was said that it was improbable that Parliament intended to take the legal title out of the feoffee to uses and put it in the beneficiary when the thing the feoffee was bound to do could only be done by him while holding the legal estate. So in all cases of active trusts the statute was held not to apply.

## Dictation.

Statute held by the courts not to apply in all cases of active trusts or uses. Where the feoffee to uses under the limitation had duties to perform like conveying the property, collecting rents and profits and paying them over, etc. it was held statute did not apply.

It was also held that the statute did not apply in case of implied uses, uses raised by implication of law.

----

It was finally determined that the statute only applied in case of passive uses in land where the feoffee held at least a freehold interest in the lands. Now a passive use is a use in which the holder of the legal estate has no duties to perform. He is simply a depositary of the legal title. Passive uses were very frequently met with in England and at the time of the passage of the statute a good deal of the land was held in that way.

## Dictation.

Determined finally that the statute only applied to passive uses in land where the feoffee to uses had at least a free hold interest in the land.

Spence's Equitable Jurisdiction Vol. 1, 466-7.

Pomeroy Eq. Vol. 2. par. 984.

Perry on Trusts, par. 300-305.

----

The great body of the commonalty was never in sympathy with the Statute of Uses. Certainly the statute did not meet with approval from the judges of the legal profession generally. The prevailing feeling is seen in the action which was taken to avoid the effect of the statute. If an estate is given to A for the use of B the legal estate vested in B by force of the statute.





What would be the result if the estate was limited to A to the use of B in fee to the use of C in fee, what interest would C take? It was held that the statute did not cover such a case. The law courts held the statute only extended to the first use. It was the intention of the transaction as indicated by its terms that C should be the final and actual beneficiary. The terms of the transaction were to A in fee to the use of B in fee to the use of C in fee, but by the construction put upon it by the law courts C took nothing. By their construction the legal estate stopped in B. The equity courts said here is an injustice because by the terms of the transaction the beneficial interest was to stop in C. The court of Chancery took the matter in hand and declared that although the legal title vested in B, yet B could not in good conscience hold the title for his own benefit but must hold it in trust for C. By this action of the court of equity C obtained the equitable estate. A large part of the jurisdiction of the equity courts seemed to be taken away by this statute but by seizing upon the construction put upon the statute by the law courts equity still retained jurisdiction to a great extent. That is the situation. The statute only applied in case of passive uses in a freehold estate but even in that case the effect of the statute might be avoided by adding another party to the conveyance.

Dictation.

And even in the case of Passive Uses it was found that the statute might be avoided by adding another party to the conveyance.

-----  
Pomeroy Eq. Vol. 2, par. 985.

Spence Eq. Vol. 1, par. 490-491-492.  
-----

It seems remarkable that a statute whose preamble denounces uses and confidences in language that was both emphatic and comprehensive and whose purpose as understood by the King and his sympathizers was to eradicate uses and confidences, should be so framed as to accomplish nothing in that direction. The Statute was drawn up by men of legal learning that must have foreseen what construction would be put upon it by the courts. An attempt to account for the peculiar construction of this statute has only been made by one author and that is Pomeroy in his work on Equity.

Pomeroy Eq. par. 983(Note)

The equitable interests known as uses that had existed prior to the passage of the Statute of Uses were left in existence subsequent to the passage as I have explained and continued to be within the exclusive jurisdiction of courts of equity. You should remember this, that after the passage of the statute of uses and the interpretation put upon it by the law courts and equity courts the use by virtue of the statute passed within the cognizance of courts of law. The passage of the statute did not do away with the equitable interest but on account



of its narrowness practically the same equitable interests remained although the nomenclature was somewhat different. But the estate and interest existed substantially the same as before and these equitable interests were protected in courts of equity. But the use after the passage of the Statute became a legal estate wherever the statute applied. The use originally an equitable interest was turned into a legal estate cognizable by courts of law. Where property was conveyed to A to hold for the benefit of B the Statute at once applied and the legal estate was put in B and was an estate that a court of law would recognize. That effect of the Statute was taken advantage of by conveyancers, who saw at once that by the operation of this statute the inconvenience of livery of seizin was done away with. They saw at once if they could create a situation that would be acted upon by the statute, the statute would by its own force create a legal title without the process known as livery of seizin. A agrees to sell a piece of land to B, B agrees to purchase. What is the situation from that time? A becomes a trustee of the land for the benefit of B, holds the legal title for the benefit of B. B is the equitable owner, but the Statute comes in and executes the use and puts the beneficial and legal title in B. B under this system by force of the Statute becomes the legal owner of the property. That is one form of conveyance that arose out of this Statute, conveyance known as BARGAIN and SALE.

-----oCo----- Nov. 6th 1902.



## LECTURE XIV.

--0--

Perhaps I have said enough in regard to the construction of the Statute of Uses. I should suggest however that after the passage of the Statute and the interpretation put upon it by the courts the use by virtue of the statute passed within the cognizance of the courts of law. I suggested to you that by force of the statute it became possible to create two or three different forms of conveyances. These conveyances were particularly useful in as much as through them the old cumbersome process of livery of seizin would be done away with. Before the passage of the Statute of Uses the only way by which a freehold estate could be delivered was by corporeal delivery of possession. The Statute took the place of a formal delivery. Wherever the Statute executed the use the legal title was put into the grantee. The first of these conveyances was Bargain and Sale. One party agreed to sell a piece of land to another and the second party agreed to purchase and upon that agreement being entered into the vendor became a trustee of the legal title for the benefit of the purchaser, he became simply a passive trustee. The Statute at once operated and executed the use and put the legal title in the vendee. So a deed sprang up known as a Bargain and Sale. The Statute not only put the title but the possession in the vendee, and under and by force of the Statute the purchaser was held to be in possession of the land although he never had seen it. The second form of conveyances which were created as a result of this Statute was known as Lease and Release. The owner of the freehold enters into an agreement with the vendee to sell him the use of the property for a certain length of time, say a year, that vests in the vendee the equitable interest in that property for a year. The Statute by force of its terms vests the legal title in the vendee for a year. Being in possession of the legal interest for one year it was easy for the vendor to release his reversion in the freehold. The release could be done without any livery of seizin. The lease was made on one day and the release made on the next. This was held to supply the place of livery of seizin: and so a conveyance by lease and release is said to have amounted to a feoffment. These were the two principal conveyances and the modern deed of to-day is made up largely of the elements of bargain and sale and ~~release~~ and release. The use, after the passage of the Statute and its construction by the courts, became a legal estate and of particular importance in the law of conveyancing. A third species of conveyance, to which this statute gave rise, is called a covenant to stand seized to uses; by which a man seized of lands, covenants in consideration of blood or marriage that he will stand seized of the same to the use of another. That deed makes him the trustee of the property for the benefit of the person designated in the deed. The statute at once executes the estate and passes the legal title to the covenantee.

Dictation.

By virtue of the Statute of Uses it became possible to



construct conveyances that would pass the freehold interest without resort to corporeal possession. In order to frame such conveyances it became necessary simply to create the relation of feoffee to uses and cestuy que use, the feoffee holding the legal title for the benefit of the cestuy que use. Then the Statute would execute the use. There were three forms of conveyances, at least, that arose in this way, namely, Covenant to stand seized, bargain and sale, and lease and release.

In as much as the use by virtue of the construction put upon the statute by the courts, passed within the cognizance of the common law tribunals it became necessary to adopt new name by which the equitable interest could be designated in order that the equitable interest might not be confused with the legal. So soon after the passage of the Statute of Uses and the construction put upon it by the courts, the person holding the legal estate was known as the trustee instead of feoffee to uses, and the person holding the equitable estate was known as the cestuy que trust instead of the cestuy que use and the estate was designated as a trust instead of a use. I have suggested that the Statute never applied to personal property. It never applied to active uses, and its application was confined to express passive uses in land. As express passive uses or trusts in land are little used in this country and have been prohibited by statutes in some states it follows that the Statute of Uses is of little practical importance. It is desirable to have an idea of the statute and its workings as an important piece of legal history effecting the existence of trusts. The statute has had a most important influence upon the law of real property. Chancellor Kent says "The principles of this statute have insinuated themselves deeply and thoroughly into every branch of real property." I have explained to you the origin of uses and the changes that took place subsequent to the passage of the Statute of Uses. I said that the various kinds of equitable interests existing prior to its passage were preserved after its passage under the name of trusts. We now have a general notion of what interests are referred to by the use of the term trust. We will now consider the various kinds of trusts. I will first consider this division of the subject without reference to any statutory changes. The law as developed by the English Court of Equity exists in most of the States without Statutory changes. In a few states a statutory system of trusts have been developed and later after I have explained the general system I will devote a little time to the Statutory system. I may say that all trusts whether of land or personalty are divided into two great classes; one class including all trusts known as Expressed trusts, and the other class all those trusts that arise by implication of law. An expressed trust is one that is created by the expressed and intention act of the party owning the property with the view of raising a trust. Expressed trusts are caused by direct volition of the party owning the land.

Dictation.

All trusts are divisible first into expressed





trusts, secondly into implied trusts. An expressed trust is one that is created by the act of the party owning the property that is the subject matter of the trust, which act is done with the expression of intention of raising a trust.

Pomeroy's Eq. Vol. 1, par. 152.

" " 2 par. 987.

Spence Eq. page 494.

Story's Eq. Vol. 2 par. 980.

----

An implied trust as the names indicates is a trust raised by implication of law. It is not the result of contract between the parties. It is not the result of any expressed intention on the part of the person owning the property. These trusts may arise under two different circumstances or set of facts; in the first place there may be a transaction between the parties that results in a transfer of the legal title but the circumstances of the transaction are such as to indicate that the intention was that the one who gets possession of the legal title is to hold it for the benefit of the grantor. Where a person gets title to property through use of money belonging to another, the circumstances showing that it was the intention of the parties that the legal title shall be held for the benefit of the person furnishing the purchase money, a trust will be raised by implication of law in favor of the party furnishing the purchase money. There is something in the transaction itself from which the law will infer that it was the intention of the parties that a trust should be created. This trust is known as a resulting trust. The person uses money belonging to another and takes title in his own name, a trust results in favor of party furnishing the consideration. I should say that the equitable title in form of a resulting trust will always pass to the person furnishing the consideration. If in any controversy you can put your hands upon the person who furnished the purchase money you have found the person who is entitled to the equitable interest. That is one class of implied trusts, the other class of implied trusts includes those types in which the trust relation is raised not by virtue of any presumed intention of the parties but because it is necessary to raise the trust relation in order to do what is equity and justice. The trust relation is thrust upon the parties in order that the court by means of the trust may make the parties do what in equity and good conscience they ought to do. Suppose a person has obtained possession of a negotiable instrument by fraud and without paying any consideration, he negotiates it to a person who understands the way in which the note has been obtained, the legal title has passed to the grantee but he takes it with knowledge of the existing equity against it; a court of equity will make out of this wrong doer a trustee of the negotiable instrument for the benefit of the true owner. The owner may go into a court of equity and get an injunction restraining him from further transferring the instrument for the purpose of keeping



the matters in statute quo until the situation can be adjusted judicially. I may go into a court of law and sue but by going into a court of chancery, I can get the actual possession of the instrument that was wrongfully transferred. This trust which is raised is called a constructive trust. Wherever title has been obtained through fraud and wherever it is determined that a trust relation is necessary in order to enable the court to make the parties do what in equity and good conscience they should do, a constructive trust will be raised.

#### Dicatation.

Implied trust are those that are raised by law, first, for the purpose of carrying out the intention (presumed) of the parties, when they are called resulting trusts. Secondly, for the purpose of doing what in equity and good conscience should be done, when they are called constructive trusts.

---

#### EXPRESSED TRUSTS.

Now let me return to the first of the two great classes of trusts, namely expressed trusts. First in order will be an explanation of the manner in which expressed trusts may be created. Previous to the passage of the Statute of Frauds a declaration of a trust was not required to be made in any particular way wherever the trust was of personalty. Where a writing was required for the conveyance of the legal interest the better opinion is that a writing was required for the creation of a use or trust. Now a law as regards expressed trusts in real estate was passed during the reign of Charles II.. This Statute which was known as the Statute of Frauds, provided among other things, that all declarations or creations of trusts or confidences in any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is in law able to declare a trust, or by a last will, etc. There is another provision often overlooked and forgotten more readily by students, which is in substance as follows: that all grants and assignments by the cestuy que trust of any trust or confidence in realty must also be in writing. The interest of the beneficiary cannot be transferred except by a writing. The language of the statute is somewhat peculiar, it provides that no declaration of any trust shall be manifested or proved except by some writing, etc., it does not require that the declaration of the trust be in writing, but it must be proved by some writing. The courts have established the doctrine that it is not necessary for the validity of the trust that it be declared or created by a writing but only that it be manifested or proved by some writing. A trust may be created by parol, but the moment you get into court and are required to prove the trust then some writing must be produced. This is the interpretation put upon the English Statute of Frauds, but in order to avoid confusion I will say that the same interpretation exists as a rule in this country, although some of the statutes are different.



## Dictation.

Previous to the passage of the Statute of Frauds(29 Car.II.) trusts in lands might be created and proved by parol, but the Statute provided in substance that all declarations of trusts in lands shall be manifested and proved by some writing signed by the party who is to declare the trust, and further that the interest of the beneficiary must be assigned, if at all, by a writing.

Pomeroy Vol. 2. par. 1006.

Bispham par . 64.

By the construction of the courts trust after the passage of the Statute may be created by parol but they must be manifested and proved by a writing.

---

The trust may be manifested in various ways, in a deed that conveys the legal title and this is the usual place for the manifesting of the trust. The legal title is conveyed to the trustee with instructions to hold it for the use of another. The trust may be manifested in a separate instrument executed simultaneously with the deed and as a part of the deed showing the use to which the property is to be put by the grantee. The trust may be manifested in a will. A party may by a writing declare himself to be the trustee of lands for another person and that he holds the lands for certain specific purposes. In all these cases except the last the written evidence of the trust comes from the grantor but it may come from the grantee. The declaration of the trust may be executed simultaneously with or subsequent to the the execution of the deed conveying the legal title. The declaration of the trust may come from the grantee at the time of the executing of the deed or years afterwards. The writing declaring the trust may be a very informal document and still be sufficient to satisfy the requirements of the Statute. It must contain certain essentials but those essentials may be contained in a most informal document. The trust may be proved by letters, memorandum, recitals etc. The trust may be proven by an admission in pleadings. I remember a case where a trust was proven by a memorandum written on an old yellow envelope.

## Dictation.

The writing by which the trust is manifested and proved may be contained in the conveyance of the legal title or it may be an instrument executed by the grantee at the time he received the legal title or even subsequent to that time, and the declaration may be a most informal document, may be a letter or a mere memorandum.

Pomeroy's Eq. Vol. 2, par. 1006-7.

Urann vs. Coates(Illus. cases page 359)

( 109 Mass 581)(Study carefully)

Bates vs. Hurd(Illus. cases page 361)

(65 Maine 180)



Hutchins vs. Van Vechten. (Illus. cases page 357)

( 35 N.E. 446, 140 N.Y. 115)

McVay vs. McVay (Illus. cases page 363)

( 10 Atl. 178, 43 N.J. Eq. 47)

---

The English Statute of Frauds has been re-enacted in most of the states in this country but the language of some differ from the English Statute, but the interpretation put upon them by the courts has been the same as put upon the English Statute. The Maine Statute requires that trust must be created and declared by some writing. What would you think the meaning of that clause would be? Ordinarily you would say that a writing is necessary for the raising of a trust, but it seems that the Supreme Court of Maine held that a trust may be created by parol but must be manifested and proved by some writing. The words "created and declared" in that statute seem to be construed by the courts to be synonymous with "manifested and proved as they stood in the English Statute of Frauds.

-----oOo----- Nov. 7 1902.

---





## LECTURE XV.

--O--

In my last lecture I was speaking about the Statute of Frauds and its effect upon the creation of trusts. I had suggested that the English Statute of Frauds was somewhat peculiar in its language, providing that every trust and confidence in lands must be manifested and proved by some writing signed by the party who desires to raise the trust. I had suggested that the words "manifested and proved" have been construed to the effect, both in England and in America, that it is only necessary to produce some writing when you desire to prove a trust. It may be created by parol and it only becomes necessary when litigation arises and you must make known the trust to the court in a legal way, that you must produce a writing that will satisfy the requirements of the statute. What that writing must contain I will explain before the close of this lecture. In the United States the Statutes of Frauds in the various states are somewhat different, varying in their provisions especially in regard to the creation of trusts. I think that there are such statutes in all the states of the union. I had suggested under this head in my last lecture the difference in the language of the statutes of the several states. The English Statute of Frauds has been reenacted in most of the States of the Union but the language of some differ from the English Statute, but the interpretation put upon them by the courts has been the same as put upon the English Statute. By consulting these statutes you will find that the word "manifested and proved" of the original Statute have been misplaced by the words "created and declared" by some writing. This change in the language has been quite generally held not to have any substantial influence upon the effect of the statute. The words "manifested and proved" and the words "created and declared" have been held to be equivalent to each other. Browne on the Statute of Frauds, has collected the statute of the various states on this subject and for a further investigation you will find them in that work. It has been held in Mich, New Jersey and New York and perhaps in several other states that an admission in pleadings is sufficient to create a trust. Suppose a man holds property in trust for another under a parol agreement, and he is proceeded against in equity for an accounting of the proceeds of the trust, and in his answer admits the trust that has been held a sufficient compliance with the statute to prove a trust.

Dictation.

In American Statutes we find usually the words "created or declared as a rule instead of the words "manifested and proved", but the courts of this country have very generally held that the two forms of expression are equivalent to each other.

See cases last cited.

See also the following cases which affirm the doctrine



that a trust may be acknowledged in a pleading and that the statute will thereby be satisfied:

Patten vs. Chamberlain 44 Mich. 5.

McVay vs. McVay (Illus. cases page 363)

(10 Atl. 178, 43 N.J. Eq. 47)

I have been speaking of the Statute of Fraud as it applies to trust in real property, I shall say that the Statute does not apply to trusts in personalty.

Dictation.

The Statute of Frauds only applies to real property. Within the term real property is comprised chattels real. The Statute of Fraud applies to chattels real.

Pomery's Eq. par. 1008.

Bispham par. 64.

Perry on Trusts par. 86.

----

But the statute does not apply to money secured by mortgages or other charges upon land.

Dictation.

Parol evidence, however, by which a trust in personalty is established must be of the most clear and convincing kind, and must find support in the circumstances surrounding the transaction and in the subsequent conduct of the party. A very good illustration of this principle is found in the case of:

Kristman vs Kristman 23 Mich. 17.

See also:

33 N.J. Eq. 133, Danser vs. Warwick.

(Illus. cases page 365)

Perry on Trusts par. 86.

----

All trusts that arise by operation or implication of law or in other words, all resulting or constructive trusts are excepted by the English Statute of Frauds. No exception is really necessary because a resulting or constructive trust arises out of circumstances surrounding the case and not out of any writing. A resulting trust may be the result of a writing but the writing itself does not create the trust. If it is created by writing it is an expressed and not a resulting trust. A resulting trust is one that the law raises on account of the presumed intention of the parties. A constructive trust is one that is thrust upon the parties by the law in order that honesty and fair dealing may be brought about.

Dictation.

Implied trusts are specially excepted from the English and from some of the American Statutes, although such exception would seem to be unnecessary.

Browne's Statute of Frauds par 83.

Pomeroys Eq. par 1008, vol. 2.

Bispham's Prin. Eq. par. 64.

----

I will now explain what a writing must contain by which a trust must be manifested and proved. The writing need not be in any particular form. I have suggested that it might be in the form of a letter, in the form of a memorandum, in the form of pleading, in the form of a deed or will, might be in the deed by which real property is conveyed



might be in the form of a contract, might be in any formal document, but it may be manifested and proved by the most informal document provided it contains certain essentials. In the first place the document must show the intention of the person signing to create a trust. If it appears that the intention of the party is to raise a trust some time in the future that will not be sufficient as a manifestation and proof of the trust under the statute. The document must indicate a present intention on the part of the party signing to create a trust.

Dictation.

Although an instrument by which a trust is manifested and proved may be a most informal document, yet, there are certain essentials that it must contain. It must show first a present intention on the part of the one signing it to create a trust.

----

It must show what property is to be assigned by the trust. It is not necessary that it be specifically described as in a deed but the property must be so described so that it can be identified and ascertained without difficulty. The property must be identified in the instrument so that a person reading the instrument can say what property is to be assigned by the trust. It may be identified by a specific description in the instrument or by a reference to some description in another document.

It must also appear from the instrument what the trust is. The document must be such that upon a reading of it it can be ascertained what the trust is without being obliged to resort to parol evidence.

Dictation.

The document must show in a general way what the trust is.

----

The instrument must show the parties to be affected by the trust. I do not mean by that, that the parties must necessarily be named in the document, but they must, however, either be named or described and referred to in such a way that they can be identified otherwise their interests will not be protected under the memorandum.

Those are the characteristics you must find in the document by which the trust is manifested and proved.

Pomeroy's Eq. par. 1009.

Bispham princ. eq. par. 65.

Perry on Trusts pars. 87, 83.

Dictation.

No particular words are necessary, the words "trust and trustee" are not necessary though usually used.

Tobias vs. Ketchum. (Illus. cases page 367)

Pomeroy Eq. vol. 2 par. 1009.

60 Penn State. 344.

----

Now the intention to create a trust may be gathered after a consideration of the instrument as a whole. A separate



class of trusts arises out of the situation such as I have suggested known as expressed trust inferred by the construction of the instrument. You cannot single out any particular part of the instrument that creates a trust but when you come to take the instrument as a whole you see that the parties intended to create a trust. I wish to impress upon you that trust may arise out of contract relations between parties and when they so arise are based upon a consideration. That is one class or division of expressed trusts. But trusts may arise without any agreement between the parties, arising out of the intention of the person owning property to hold it for the benefit of another, these trusts are purely voluntary and not based upon a consideration, the party receiving the benefit paying nothing for it and promises to pay nothing for it and that constitutes another class of expressed trusts.

Dictation.

The mere inchoate desire to create a trust at some future time is not sufficient even though solemnly and formally expressed. The intention must be a present one and a completed one. These suggestions are pertinent in connection with the subject of voluntary trusts.

#### VOLUNTARY TRUSTS.

Dictation.

Trusts may arise out of contract relations, out of special agreement between the parties; trusts of this kind are based upon a consideration and constitute an important class of expressed trusts. But trust can arise out of the voluntary act of the party owning the property, trusts of this kind are not based upon a consideration.

-----

This matter of the absence or presence of consideration is of great importance in this class of trusts.

Dictation.

Where trusts are based upon a consideration any irregularity connected with the transfer of the legal title is of little importance for the irregular instrument of conveyance will be held by the court to be an agreement to convey. If the deed by which it is intended or attempted to convey the legal title is informal the court of equity there being a consideration will regard as an agreement and will compel the execution of the instrument. Wherever there is a consideration underlying a transaction the party furnishing the consideration is the one equitably interested and his rights will be protected even though the transaction be an informal one.

-----0-----

Nov. 13, '02.





## LECTURE XVI.

--oOo--

We were considering the subject of voluntary trusts. As an introductory statement of that statement I suggested to you the equitable doctrine in regard to consideration, which is this: that where a transaction is based upon a consideration even though it is informal equity will regard the instrument as an agreement to convey and will enforce the agreement. If the instrument is a deed but is too informal to convey the legal title but there is a consideration for it, equity will consider the deed as a contract to convey and will enforce the deed as a contract. The grantee in the deed can file his bill in equity for the specific enforcement of the contract. Now let us suppose the transaction is purely a voluntary one, not based upon any consideration. A party desires to make another the object of his bounty, he does so but in such an irregular way that the legal title does not pass, will equity consider him as the trustee of the legal title for the person whom he intended to benefit? A perfect and complete trust will always be enforced in equity even though it is purely voluntary, but in order that the court may take jurisdiction and enforce the trust it must be complete and perfect. If a person desires to convey the benefit of his bounty upon another person he may do so in either of three ways. In the first place he may convey to that person whom he intends to benefit the legal title to the property. Suppose I desire to convey the benefit of my bounty to a friend, I may convey the legal title to my friend although there is no consideration, although a consideration should be expressed in the deed. If I convey the land directly to the party intended to be benefitted and observe all the formal rules required for such a conveyance, he gets both the legal and equitable title, it is a perfected and completed transaction even though not based upon a consideration. But suppose there has been an irregularity in the deed of conveyance so that the legal title does not pass will equity say to the grantor, you intended to give that land to your friend, you did what you supposed was sufficient to carry out that intention, but you have failed because you have not observed some formal requirements of the law, and therefore equity will make you a trustee of the land for the benefit of your friend, and by so doing you will do what you intended and wanted to do and what you tried to do? Equity will not do this. Equity will in accordance with the weight of authority only enforce complete and perfect transactions. It is not sufficient to justify an application to a court of equity that there is merely an inchoate design to create a trust, that design must have been put in completed form. Whenever a person adopts this course, namely conveying the legal title to the person intended to be benefitted, he must observe all the forms of law, otherwise his gift will fail. A court of equity will not perfect an imperfect voluntary conveyance and work out of the situation a trust relation between the parties. It will not do so because there is no consideration upon which a court of equity can base its action.

Young vs Y. Young (Illus cases page 380) is quite a striking case upon this point.



two of his sons; he was the owner of certain United States and town coupon bonds that were of two classes, he put one class of bonds in an envelope and deposited the bonds in a safe to which the sons had access, the other bonds were put in another envelope and also deposited in the safe. He showed these envelopes to the wives of his two sons and said that they were intended for his sons. There was no doubt but that he intended that these bonds should go to these sons upon his death but during his life he continued to collect the interest upon the bonds. At one time when the tax collector came around he said the tax on the bonds should be assessed to his sons as they belonged to them. But during his life they were in his control, in his safe, and in his hands, no instrument of title passed from him to his sons. The sons tried to sustain the transaction in two ways, first by claiming that it was a gift. That there was sufficient delivery to satisfy the requirements of the gift. The court said not so under the circumstances. The bonds themselves were not delivered, no muniments of title were delivered and there is no gift. Then the sons claimed that there was a trust relation existing between them and their father during his life growing out of the transaction and that the father should be held by the court to be a trustee of the bonds for the benefit of his sons during his lifetime. The court said no, if there is a gift the two positions you occupy are inconsistent. If there is a gift there is no trust. There is nothing in the whole case to show that the father held those bonds for the benefit of his sons. The sons therefore failed in their suit, failed simply for the reason that the transaction was not a completed one and could not be sustained either as a gift or as a trust.

Dictation.

It is well settled that a perfect and completed transaction will be recognized and enforced in equity even though it is purely voluntary. A consideration is not necessary to the enforcement of a perfect transaction. If one desires to make another the object of his bounty, he may do so in either one of three ways. He may convey the property directly to the party. If in so doing he observes all of the forms of law a title vests in the grantee even though there be no consideration. But what is the result when there is some irregularity in the conveyance that prevents the vesting of the legal title? Will the court of equity perfect the transaction? By the weight of authority it must be concluded that equity has no power to perfect an imperfect voluntary conveyance. But equity has power to perfect a conveyance that is based upon a consideration.

Young vs. Young (Illus. cases page 380) 80 N.Y. 412.

(Study this case carefully)

In re Webb's Estate (Illus. cases page 385) 49 Cal. 541.

Richards vs. Delbridge (Illus. cases page 378) L.R. 18 Eq. 11.

(Study this case carefully)

Martin vs Funk (Illus. cases page 386) 75 N.Y. 134.

(Study this case carefully)

Beaver vs. Beaver (Illus cases page 389)

Bath Sav. Inst. vs. Hathorn (Illus. cases page 392) 88 Me. 1221.

the 1990s, the number of people in the world who are illiterate has increased from 1.2 billion to 1.5 billion. The number of illiterate people in the world is projected to increase to 1.7 billion by the year 2015. The number of illiterate people in the world is projected to increase to 1.7 billion by the year 2015. The number of illiterate people in the world is projected to increase to 1.7 billion by the year 2015.

According to some authorities, however, an imperfect voluntary transaction may be perfected through the medium of the trust.

Richardson vs Richardson (Law Reports Equity Cases (3) page 686.

Morgan vs. Haleson 10 Equity(L.R.) 475.

---

The weight of authority, however, is against the doctrine expressed in the two cases above cited, and in favor of the doctrine heretofore stated. I would not say however that the supreme court of Michigan if the doctrine was clearly put before them as laid down in the case of Richardson vs. Richardson, would not follow it. In the case of Ellis vs. Secor 31 Mich. 185, although the law laid down in that case is not usually followed, may aid you when in difficult straights. I do not think the law laid down in the case is good law. The facts were these: A lady who lived in Manistee for a number of years and possessed of considerable property that came to her in one way and another, she had never married and was alone in years, and had very few acquaintances and friends. One Doctor Ellis had attended her more or less in sickness at various times and had befriended her in various cases. One night she was taken ill and in the morning she was found dead in her room. On the table at her side was found a slip of paper with these words written upon it "I wish Dr. Ellis to take possession of all, both personal and real and mixed, I am so sick I believe I shall die, look in valise." A valise was found and it contained the securities for the bulk of her property. The intention of the woman was that the property should go to Dr. Ellis. The Supreme Court of Michigan said that he was entitled to it under the circumstances. Judge Campbel gave the opinion of the court and took this position, that although there was no valid assignment of these securities for the reason that the securities were not delivered, and no instrument of assignment executed and delivered, yet in equity the title to that property must be recognized as in Ellis for the reason that this poor woman did all she could under the circumstances, that it is the function of a court of equity to carry out the intention of a party even though the intention is very informally expressed. But it seems to me that this is carrying the principle beyond the bounds of safety, and the case is not usually recognized as authority although it must stand as authority in this state until over-ruled.

Ellis vs. Secor 31 Mich 185.

Dictation.

According to some authorities an exception to the general rule that I have explained to you is found in case a person attempts to benefit his wife or children or others dependent upon him but through some irregularity fails to convey the legal title. In these cases according to some authority the meritorious consideration takes the place of the actual consideration.



In favor of this exception:

Grangiac vs. Arden 10 J.R. 292.

8 North Carolina 250.

Perry on Trusts par. 95-107-109.

Contra:

Story Eq. par. 433.

Dictation.

The other two ways are where property is conveyed to a trustee for the benefit of the intended donee and where the owner of property declares himself to be a trustee of it for the benefit of the intended donee. In either case in order that the transaction may be recognized and protected by equity it must be completed and perfect. And if it is so equity will protect the donee in his rights even though at the time of the creation of the trust he has no knowledge of it, provided he accepts the benefits when notified.

----

But where there is a mere intention on the part of the owner of property voluntary to create a trust and contemplates further acts to give effect to the trust, the trust is not completely constituted and such person cannot be compelled to complete it. In Martin vs. Funk Church C.J. Says: "It is clear that a person sui juris, acting freely and with full knowledge, has the power to make a voluntary gift of the whole or any part of his property, while it is well settled that a mere intention whether expressed or not, is not sufficient, and a voluntary promise to make a gift is nudum pactum, and of no binding force. The act constituting the transfer must be consummated, and not remain incomplete, or rest in mere intention, and this is the rule whether the gift is by delivery only, or by the creation of a trust in a third person, or in creating the donor himself a trustee. "

Dictation.

In case the legal title is not assignable by the owner thereof it will be sufficient if he does all he can towards making an assignment, equity will recognize his efforts as expressing his intention and will perfect the transaction. If the property is equitable and not legal a voluntary transfer of it may be made provided the necessary forms of transfer are observed.

Pomeroy's Eq. Vol. 2, par 999.

Perry on Trusts par. 102.

-----oOo-----

Nov. 14."02.





## LECTURE XVII.

--0--

We were considering the different ways in which expressed trust may be created. I tried to impress upon you that no special formality is required for the creation of an expressed trust. A trust may in most states be created by parol but when you come to prove the trust you must show a writing. That writing although usually a formal document is not necessarily so, but it must however, indicate certain things: First, it must show above all an intention to create a trust; Secondly, the property to be affected by the trust; Thirdly, it must show the parties to be benefitted by the trust; Fourthly, it must show in a general way what the trust is. But all of those things may be shown by a very simple document. A trust is usually declared in the instrument by which the legal estate is conveyed, but it may be created in an instrument subsequent to the conveyance, it may be declared in a mere memorandum or letter or it may be declared by a pleading. It is not necessary that the words "trust or trustee" be used although usually found in a document of that kind. I said in the last lecture that an expressed trust might be inferred by construction of the whole instrument, and this is the subject I wish to talk upon this morning.

## TRUSTS INFERRED BY CONSTRUCTION OF THE INSTRUMENT.

Usually the instrument from which an expressed trust is inferred by construction is a will, but a trust may be inferred from a contract or a deed. A will is made in which you cannot find a single clause to say directly that a trust has been created; you cannot find a single line or a paragraph that if itself raises a trust, but when you take the whole will into consideration and look at the will as an entirety and read it in the light of all the circumstances that surround the testator at the time of the making of the will it is manifest that the testator intended to create a trust. Wherever this conclusion is reached after the reading and construction of the entire will we have what is termed a trust inferred by the construction of the instrument and this is an expressed trust. Some authors speak of it as an implied trust. Perry in his work on Trusts so considers it. I do not think such a classification is advisable for if we use the term implied trusts to this kind of a trust we are liable to confuse these trust with resulting and constructive trusts, trusts that the law raises from the surrounding circumstances or in order that justice and equity may be done. These trusts are not trust raised by law, they are trust raised by the party making the instrument through the language he has used as contained in the four corner of the instrument.

## DICTATION.

Trusts may frequently be inferred by construction of the



entire instrument. While there is no part of the instrument that distinctly and definitely provides for the trust yet when you consider the instrument as a whole it is perfectly apparent that the testator intended a trust. This is not an implied trust because it is not raised by the law, it is an expressed trust created by the party.

-----

I wish to impress upon you that in order that we may have what is known as a trust inferred by construction of the instrument, the trust must arise out of the instrument itself. The intention to create a trust must be expressed within the four corners of the instrument. You may know that the testator intended to create a trust but when you come to read the instrument you find there is no trust expressed therein, under those circumstances a trust will not be inferred, even though it be perfectly well known that the testator intended to create a trust. That intention may be gathered from conversations that people have had with him, but you cannot prove the intention to create the trust by outside evidence. The intent must appear somewhere within the four corners of the instrument. I do not mean to say by that, that you cannot resort to parol evidence at all, I mean you cannot resort primarily to parol evidence to show the intention of the party. You may show by parol evidence the situation of the testator, how his property was circumstanced, show his relation to the different parties and what would be the natural disposition of his property, but his final intention and final purpose is centred in the instrument.

#### Dictation.

Trusts of this kind must be found, if at all, in the instrument. The intention of the party to create a trust cannot be shown by parol evidence. You may, however, show by parol the situation of the parties interested, of the property in controversy, may show whatever in fact will place the court as nearly as possible in the position of the testator.

-----

I am going to explain the different circumstances under which trusts are usually inferred by construction of the instrument. I have thought best to divide the field into three classes.

#### DICTATION.

Trusts may be inferred by construction of the instrument, first, from powers and authorities given to the grantee in case of conveyances and agreements between living parties or conferred upon the executor in case of wills. If the legal title is necessary in order that the party or executor may execute the powers conferred a trust will be raised and the legal title put in the party or executor. Wherever an executor is clothed with authority in regard to real property the exercise of which requires the legal title in him, he will be held by a court of equity to be the legal owner of the property as trustee for the purpose of executing the powers.

Tobias vs. Ketchum (Illus. cases page 367)  
(32 N.Y. 319)

117

118

119

120

121

122

123

124

125

126

127

128

An expressed trust may be inferred by construction of the instrument, secondly, where property is given to a parent or other persons standing in the relation of parent, accompanied by directions in regard to the support or maintenance of his family or children. Illustration: Suppose property is left by will to a parent ; with the suggestion that the parent use the property for the education of his children, such a suggestion which is not imperative would not raise a trust and the parent takes the absolute title, but if the expression in regard to the education of the children takes on an imperative quality so that it is more than a mere suggestion or advice, in other words if it amounts to a direction, a trust is at once raised. The parent does not take the absolute title but takes the title that is encumbered by this trust. In the case of *Smith vs. Bowen* 35 N.Y. 83., the testator devised by will as follows: "All my estate both personal and real of which I shall die seized and possessed, and which is not hereinafter specified as given to my dear children, I give to my beloved wife to be used and disposed of at her discretion for the benefit of herself and my daughters A,B, and C." Held: that language of that kind created a trust for three fourths of the estate in question for the benefit of the three daughters.

In the case of *Young vs. Young* 68 N.C. 309 a will read as follows: "To my beloved wife I give all my estate, real, personal and mixed, to be managed by her(that she may be enabled the better to control and manage her children) to be disposed of by her to them in that manner she may think best for their interest and her own happiness,Held. to be a gift to his wife in trust, not for herself nor for the children alone, but for both, to be managed at her discretion for the benefit of herself and children.

In *Taft vs. Taft* 130 Mass. 461, a testator devised to his daughter the use, income and improvement of all his real and personal estate, with the power to sell the real estate or to cut and sell the wood and timber thereon, and to devote the profits of such sales, as well as the income of the property, to the maintenance and support of herself and her children, and with the privilege of disposing of any part of the profits derived from the sale of the land or from other sources in such way as she may think best. Held: that the will created no trust for the benefit of the children but that they took contingent remainders.

#### Dictation.

Expressed trust may be inferred by construction of the instrument, secondly, where property is given to a parent or other person standing in the relation of a parent accompanied by directions or expressions in regard to the maintenance of his family or children. If these expressions are mere recommendations no trust will be raised, the parent will take the property absolutely. If, however, they have an imperative or are in



fact directions, then a trust will be raised.

Perry on Trusts, par. 117-119.

Pomeroy, Vol. 2, par. 1112.

Smith vs. Bowen 35 N.Y. 83.

Young vs. Young, 68 N.C. 309.

Taft vs Taft, 130 Mass 461.

Thirdly: a trust may be inferred by construction of the instrument, where a testator has made use of precatory words in connection with a devise for the benefit of strangers. In the case of Knight vs. Knight 3 Beavans 148, the meaning of the expression "precatory word" is very clearly explained. "As a general rule it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favor of another, the recommendation, entreaty, or wish shall be held to create a trust, First, if the words are so used, that upon the whole they ought to be construed as imperative.

Secondly, if the subject of the recommendation or wish be certain; and,

Thirdly, if the object or person intended to have the benefit of the recommendation be also certain. "

DICTATION.

Trusts may be inferred by construction of the instrument, where a testator has made use of precatory words in connection with a devise. These words may be used in connection with a devise for the benefit of a wife or children or strangers. Under such circumstances a trust will be raised, first, where the words are imperative in the notion that they convey. Secondly, the subject of the recommendation must be certain. Thirdly, the persons who are to be benefited thereby must be clearly indicated.

An early leading case upon this subject is Knight vs. Knight. 3 Beavan 148.

Pomeroy, Vol. 2, par. 1016.

DICTATION.

The attitude of the courts in regard to trusts arising from the use of precatory words has during modern times changed materially. Formerly the courts were inclined to raise a trust out of the mere use of precatory words. At the present time the precatory words must always be construed in connection with the entire instrument.

Pomeroy Vol. 2, par. 1014-1017.

Bispham par. 71-76.

Perry on Trusts, par. 112-116.

Warner vs. Bates (Illus. cases page 370)

(98 Mass 274)

Hess vs. Singler (Illus cases page 373)

(114 Mass. 56)

Clay vs. Wood (Illus cases page 375)

(153 N.Y. 134)





## LECTURE XVIII.

--C--

In my last lecture I finished all that I desire to say in regard to the creation of expressed trusts. I will now devote some time to a consideration of the different classes of expressed trusts. Expressed trusts are properly divisible, first, into two general classes, namely, PRIVATE and PUBLIC trusts.

Private trust, as the name indicates, is a trust that is created for the benefit of a particular person or particular persons. The beneficiary in a private trust is always ascertained and definite, if the beneficiary is not ascertained and definite the trust must fail for we cannot have a private trust without a well ascertained cestui que trust. The second class embraces public trust, a public trust is sometimes called a charitable trust. One of the distinguishing characteristics of a public or charitable trust is found in the fact that the beneficiary or beneficiaries are not ascertained persons, the beneficiaries are always a class that are changing. The beneficiaries may be composed of a certain set of persons one year and another set the next year. A public trust is one wherein the beneficiary is uncertain. The trust may be for the benefit of the poor of a certain parish, or for the benefit of the needy and deserving students of a certain university, or for the purpose of bringing water into a town for the use of the inhabitants, these are examples of public or charitable trusts. The persons to be benefited by the trust are unascertained. Another characteristic that I may mention is the fact that a public or charitable trust need not be so definitely created as a private trust. If a person intends to create a trust for the benefit of the public or for charity even though that intent is not fully and clearly set forth in the instrument, the courts, by a rule of the common law, known as the Cy pres doctrine, will carry out, as far as possible, the intent of the party, and raise a public or charitable trust.

Dictation.

All Expressed trusts are divisible, first, into PRIVATE and secondly, into PUBLIC or CHARITABLE TRUSTS. The private trust is one created for the benefit of certain and designated persons, in public or charitable trusts the beneficiaries are unascertainable, uncertain or fluctuating.

Pomeroy Vol. 2, 987, 1018.

Bispham's Princ. Eq. 190.

Expressed private trusts are divisible into two kinds, namely, EXPRESSED PASSIVE TRUSTS and EXPRESSED ACTIVE TRUSTS. The expressed passive trust is sometimes called a simple trust and sometimes a pure trust, while the expressed active trust is sometimes spoken of as a special trust.

---

With regard to expressed passive trust, I should suggest that it is not met with very frequently as attached to real property, in this country. The reason is that in many



of the States statutes have been passed forbidding the creation of expressed passive trusts. Nos on account of our notion in regard to the holding of land, passive trusts are naturally not resorted to. The expressed passive trust is more frequently resorted to in England by reason of the fact that they have what is known as marriage settlements, and through the instrumentality of the expressed passive trust keep property in a given line or family. The policy of this country is to keep the land distributed among the people as much as possible, so the passive trust is not often met with even in those states where it is not prohibited by statute. In the passive trust the legal title is vested in the trustee, but he has no duties to perform; he is simply the depository of the legal title. He has no right to act in regard to the title without the consent of the cestui que trust, has no right of possession, has no right to control the possession, the cestui que trust is usually in possession of the property and to all appearances is the owner of the property, but there is this outstanding naked legal title in the trustee. If the cestui que trust desires to bring an action in a court of law he is bound to use the name of the trustee because the legal title vests in him but the trustee cannot refuse the use of his name and has no control whatever over the proceeding, the function of the trustee is merely a formal one. In this country although we do not meet with these trusts in regard to real property very often, it is not unfrequent that we come across them in regard to personalty. For example a person deposits money in a bank for the benefit of the cestui que trust, the bank holds the naked legal title to that money. The entire control of the money is in the hands of the person who has made the deposit excepting so far as he has given control to the cestui que trust.

Dictation.

The expressed passive trust in regard to realty is not frequently met with in this country. Such trusts are prohibited in most states by statute. In expressed passive trusts the trustee is simply the depository of the legal title. He has no duties to perform. He is entirely subject to the control of the beneficiary, who usually has possession of the realty. In legal actions the trustee's name must be used but he has no control of the action that being left entirely to the beneficiary. We may have passive trusts in personalty as well as in realty.

Pomeroy Vol. 2, 988, 990.

Perry on Trusts, par. 18, 520, 521.

Wirkland vs. Cox (Illus cases page 397)

(94 Ill. 400)

-----

An expressed active trust is one in which the trustee is charged with active duties in regard to the trust property. The trustee becomes the active person in regard to the property. These duties may arise in various ways; they may arise from express provisions enumerated in the instrument creating the trust. It is always competent for a person creating a trust to



designate what shall be the duties of the trustee. There are some trusts where the duties of the trustee are regulated by statute, as in case of an administrator. In case of an executor named in a will duties may be added not provided for by statute. If the duties are not provided for in the instrument or by statute, then the trustee when in doubt how he should proceed, should apply to a court of equity. trustee should never take steps in administering a trust estate where his duties are not fully set forth in the instrument or pointed out by statute without applying to a court and getting directions as to how he should act.

Dictation.

In case of active trusts the trustee has active duties to perform. These duties may be set forth in the instrument by which the trust is created or in some statute or they may be specifically provided for by the court of equity.

In case of expressed active trusts the legal title is in the trustee as is the possession usually and the legal title will always by the court of equity be held sufficiently extended to enable the trustee to perform all the duties imposed upon him.

Kirkland vs Cox (Illus cases page 397)

Perry on Trusts 312.

Spence Eq. Juris. pages 496-497.

--

If the trustee fails to perform the duties imposed upon him by the instrument the cestui que trust has the right to compel him to do so.

Dictation.

Although the interests of the beneficiary in the expressed active trusts are more circumscribed than that of the beneficiary in the expressed passive trusts yet, the beneficiary always has the right to call the trustee to account, if in his judgment, the trust duties are not being properly performed. This may be done by a special application to the equity court, or the question may come up in connection with the settlement of the trustee's account.

---

Expressed active trust may be created for various purposes. They may be created for any purpose not unlawful. In the absence of statute there is no limitations upon the extent of expressed active trust, excepting the limitation I have suggested. You cannot create a trust for purposes that would be contrary to law or to public morals. But in many states you will find that the power to create expressed active trusts has been limited and controlled by statute.

Dictation.

Expressed active trusts when there is no statutory limitations may be created for any purpose that is not unlawful. The trusts usually met with however, may be grouped into the following classes: First, those that are created for the purpose of having the property conveyed to some designated person.



Secondly, those that are created for the purpose of having the property sold and the proceeds distributed as in the case of assignments for the benefit of creditors.

---

Thirdly, trusts created for the purpose of accumulating the property and investing the same and the profits for certain designated purposes. Trusts of this kind must not violate the statute in regard to perpetuities.

---

The fourth class is a very large class embracing all those cases where the trust is created for the purpose of having the trustee handle the property and make what he can out of it and pay over the rents and profits to a designated persons, to the widow, children, etc.

Dictation.

Fourth class, those trusts in which the trustee handles the property and distributes the proceeds as fast as they are received.

---

Trusts in the third and fourth class usually embrace trusts in the first class because there is almost always a provision in a trust of the fourth class for a conveyance of the corpus of the property at the termination of the trust to the persons entitled to have it. Although trusts of the first class are not frequently met with as separate and distinct we do meet with them as combined with other trusts.

Pomeroy Par. 991, 992.

Now you have in mind what a passive trust is, what an active trust is, and have found out how these trusts may be created. Another subject that is most always discussed in connection with expressed trusts for the reason that it is closely allied to it, particularly since the legislation that has regulated trusts by statute. I refer to the powers in trusts that are closely allied to expressed active trusts. This is a subject of a good deal of practical importance and unfortunately a subject of a good deal of difficulty. A power, speaking generally, is an authority given to a person to do something in regard to property the legal title of which is in another. There are various kinds of powers, pure powers, naked powers, powers coupled with an interest, powers of attorney, etc. The powers that I wish to discuss in this connection are mere or naked powers and powers in trust. A mere or naked power is an authority conferred upon a person to do something in regard to property the legal title of which is in another, conferred in such language that its execution is discretionary. A man by will confers upon his wife authority to sell and dispose of certain real property and distribute the proceeds among a certain class of persons, but the authority is conferred in such language as to permit the wife to sell or not to sell just as she fit. The beneficiary cannot enforce his right in any court because he has no right until the power is executed and the execution





of the power is purely discretionary with the donee of the power. The donee of the power is the one that is to execute the power.

Dictation.

Powers are of various kinds, but those that concern us in this connection are mere or naked powers and powers in trust. A mere or naked power is a authority given to a person to do something in regard to property the legal title of which is in another conferred in such language that its execution is discretionary. A mere or naked power is purely discretionary. Its execution cannot be compelled by the beneficiary there under.

---

-----O----- Nov. 31st 1902.



LECTURE XXIX.

--0--

I was talking about the subject of powers and suggested that the subject is one that is closely connected with the subject of trusts particularly in view of the legislation we find in the several states upon the subject of trusts. As I will explain a little later in the hour, trusts have been regulated by statute in some of the states, and under certain conditions you will find that powers in trusts are permitted to take the place of trusts. As I recollect I had given you a definition for a mere or naked power. The central idea is that it is an authority conferred upon some one to do something in regard to property the legal title of the property being outstanding in another. But this authority is conferred in such a way that the donee of the power may exercise the power or not as he sees fit. When the language of the deed or will, as the case may be, shows that the intention of the owner of property was to confer a power that may or may not be exercised at the will or discretion of the donee of the power, that is a mere or naked power and the beneficiary cannot compel the donee of the power to exercise the power.

Perry on Trusts, par. 248.

A power may be coupled with a trust. The power in trust is analogous to trusts in many particulars but it is to be distinguished from it. In the case of a trust, we have a trustee; in case of a power in trust we have a donee of the power; in case of a trust we have a cestui que trust; in the case of a power in trust we have a beneficiary; in a trust we have property that is the subject matter of the trust; in case of a power in trust, we have a power that is the subject of the trust. The title to the property in case of a power in trust is never in the donee of the power. The title to the property lies outside in someone else. The subject matter is not in the property but in the power which is conferred in imperative terms. A power in trust is very pointedly defined by Finch J., in the case of *Delaney vs. McCormack* (88 N.Y. 174)- "A power to be exercised by the grantee, not at all for his own benefit but wholly and entirely for the benefit of some other person or class of persons, is necessarily exercised by such grantee in a trust capacity. The element of trust inheres in its substance and is its essential and vital characteristic."

Dictation.

The power in trust is distinguished from the mere power in that, it is imperative and not discretionary. It is analogous to the trust proper but notwithstanding this it differs from it in some essential particulars. The power in trust is distinguished from the trust in this, that in the



latter the trustee holds the legal title for the benefit of the cestui que trust, in the former the legal title is outstanding in a third person, and the trustee has authority simply to convey or deal with the property conferred by imperative language. Definition: A power in trust is authority to dispose of property, the legal title of which is in another, the authority being imperatively conferred.

Delany vs. McCormack (Illus. Cases 399)  
(88N.Y. 174)

The duties of the donee in case of the power in trust are conferred in imperative language so he is bound to perform them. He has no discretion; he must perform the duties that are imposed upon him exactly as they are outlined in the instrument by which they are imposed. This statement should be modified somewhat. He has no discretion whether he shall perform the power and the beneficiary can go into a court of equity and compel him to exercise the power. But he may have discretion in the way he shall perform the power. Discretion of that kind is frequently given to the donee. He may have the right to use discretion as to the classes that are to be taken into consideration in the distribution of the proceeds of the power. In such cases the imperative quality has simply to do with the exercise of the power. But if he fails to perform an imperative power and a beneficiary under the power is required to go into a court of equity to compel the performance of the power, a court of equity will not attempt to exercise any discretion. A court of equity will divide the property up equally among the beneficiaries in obedience to the maxim that equality is equity.

Salisbury vs. Denton (3 Kay & Johnson 529)

In that case a bequest is made of a fund to be at the disposal of the testator's widow by her will to apply a part to the founding of a children's school or such other charitable institution for the benefit of the poor as she may prefer and the remainder to be disposed of among testator's relatives as she may desire. The widow failed to exercise the power and it was held by the court that the power was a valuable one and that one moiety of the fund should go to charity, and the other moiety should be distributed among the testator's relatives according to the statute of distribution.

Russel vs Russel (36 N.Y. 581)

In that case a testator directed his executrix to sell real estate "As she shall deem expedient and for the best interests" This was held to be a power in trust.

We will now consider what is called a power coupled with a trust. In the case of a power in trust the legal title to the property is outstanding in a third person, in case of a power coupled with a trust the title to the property is in the person who is to execute the power. He holds that title not as



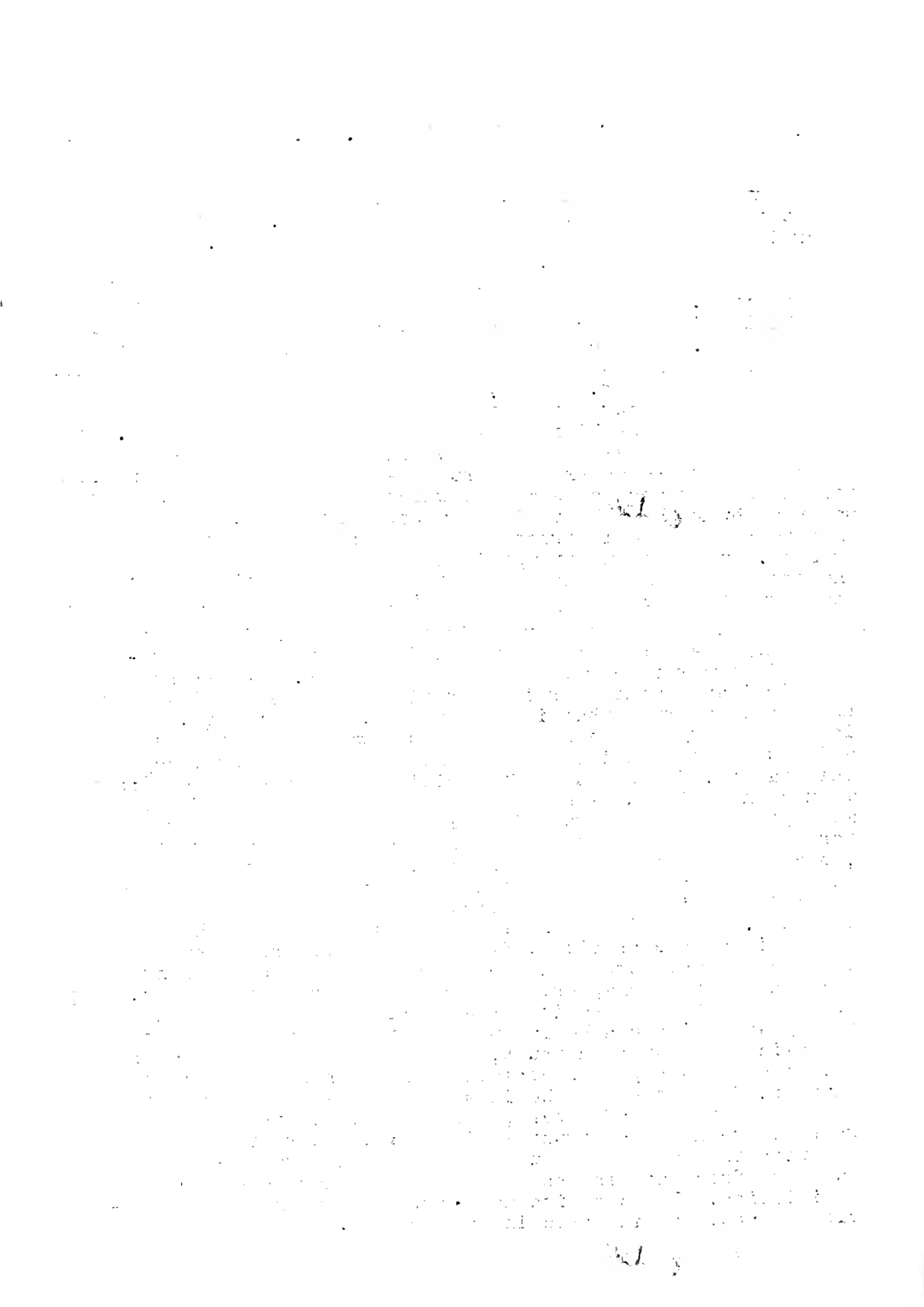
donee but rather as trustee. He acts in a double capacity, first as trustee and secondly as donee of the power. So far as the power is concerned it is exactly like a pure power.

#### DICTATION.

We sometimes meet with what is called a power coupled with a trust. In a case of this kind the donee of the power has the legal title to the property, he holds the legal title as a trustee. He executes the power not by virtue of the fact that he has been made a trustee but rather that he has been made a donee of the power.

I will suggest that in some of the states express trusts have been prohibited except as provided by statute. In some of these states we find provisions in the statute to the effect that where an express trust has been prohibited provides for the performance of some act which can lawfully be performed under a power shall be valid as a power in trust. In order that there be a valid trust the legal estate must vest in the trustee. But when an attempt is made to create an express trust the trustee has no authority to take the legal title therefore the legal title does not vest in him. But in the case of a power

trust the legal title does not vest in the donee and it is not necessary that the donee have the legal title to the property in order to carry out the power. Referring to the Michigan statute for illustration; it is impossible for us to have a trust that is not authorized by statute. Early in the history of the state a statute was passed that abolished all trusts and confidences in land excepting as provided in the statute. The statute after wiping the slate clean turned around and built up a statutory system of trusts. If you attempt to create a trust in this state that is not provided for by statute the legal title will not go to the trustee, because the statute says under such circumstances the title will not go to him, it will go to the beneficiary but he will take it under such circumstances subject to the power in trust. Section 8842 of the Compiled Laws of the State of Michigan 1899 provides: "When an express trust shall be created for any purpose not enumerated in the preceeding sections of this chapter, no estate shall vest in the trustee; but the trust if directing or authorizing the performance of any act which can be lawfully performed under a power shall be valid as a power in trust, subject to the provisions in relation to such powers contained in the next succeeding chapter." You can see the importance of knowing something about the subject of powers, particularly in those states where there has been trust legislation. Powers in trust are met with in those states where there is no trust legislation but more frequent in those state where there has been such legislation. The question may occur to you why such a provision should be inserted in the statute. Why was it made





possible in every case where a trust fails to accomplish the same result through a power in trust? What has been gained by this legislation? I have never seen any explanation by any text writers nor by any of the cases that I have examined, but I presume the explanation would be this, however, that the opportunity for fraud would not be so great under a power in trust. The owner of the legal title may almost always under certain conditions defraud the beneficiary. The trustee may transfer the property to an innocent purchaser and thus defraud the beneficiary. But in the case of a power in trust, the donee who corresponds to the trustee, is hedged about by the conditions attached to the power and can exercise that power only as it is pointed out in the instrument creating the power.

The next succeeding chapter of the statute has to do entirely with powers. It abolishes all powers and then proceeds to build up a system of statutory powers. The chapter begins in the following language; "Powers, except as authorized and provided for in this chapter are abolished" We find very few changes in the essential particulars of the powers from those previously existing. The statute practically abolishes the old equitable powers and re-enacts them in the form of statute. .

#### DICTATION.

In several of the states we will find trust legislation that provides that wherever a trust is attempted that is not authorized by statute it may be carried out as a power. The legal title in such cases would not go to the trustee (donee of the power) but would be outstanding in another and would be held subject to the execution of the power.

Michigan Compiled Laws 1899, pars. 8842 and 8843..

Pomeroy's Equity Jurisprudence, Vol. 2, pars. 834, 835 and 1002.

Bispham's Principles of Equity, par. 77.

Perry on Trusts Vol. 1, par., 248-258.

Brown vs. Higgs, Beasy Chancery 561.

I come now to this trust legislation we find in several of the states. I shall describe the general purposes of this legislation and then describe with some particularity the legislation in the state of Michigan. I should say that the general features of this legislation is the same everywhere. It began in the state of New York somewhere back in the forties and was copied first by the state of Michigan and then by Wisconsin, Minnesota, California and the Dakotas and several of the other western states.

#### DICTATION.

The trust legislation we find in several of the states has the following characteristics, first, all uses and trusts in lands except as authorized and modified by statute are abolished.



## LECTURE XX.

--O--

I believe I have said all I desire to say on the subject of powers in trust. Remember that the essential characteristics of a power in trust is that it is imperative and that the power is the subject of the trust and not the property. The distinction between a mere power and the power in trust is that the former is discretionary and the latter is imperative. The distinction between a power in trust and a trust proper is that the property is vested in the trustee in case of a trust. In case of a power in trust the donee takes no title to the property. In case of a power coupled with a trust the title to the property is in the person as trustee who as donee of the power is to execute the power. He acts under such circumstances in two capacities. First as trustee of the property and secondly as donee of the power. I said that the matter of powers in trust was of large practical importance because in many of the states where trusts are abolished by statutes the trust may be executed as a power in trust. I had come to a consideration of this trust legislation in the different states and was describing the characteristics of that legislation. I said the first characteristic was that it abolished all uses and trusts. In some of the states this legislation is so broad that it includes uses and trusts in personalty as well as in realty, but usually it has only to do with uses and trusts in realty. A provision is often found in connection with this legislation that is of some importance which reads as follows: "Every person who by virtue of any grant, assignment or devise, now is or hereafter shall be entitled to the control and actual possession of land and to receive the rents and profits thereof shall be deemed to have the legal estate of the same quality and duration and subject to the same conditions as his beneficial interest." The effect of that statute is to change the equitable title into a legal estate. This statute does away with passive trusts and re-enacts the principle of the Statute of Uses. The cestui que trust takes the legal as well as the equitable estate in case a passive trust is attempted. It is impossible in Michigan to have anything like a passive trust, for the reason the moment it is created the Statute changes the equitable estate into a legal estate.

## DICTATION.

In most of these states statutes exist that confer upon the one entitled to the possession of real property or to receive the rents and profits under a devise or deed, the legal title. A Statute of that kind reenacts the controlling principle of the Statute of Uses and it does away with the possibility of a passive trust in realty for the reason that the moment the trust is created the statute changes the equitable interest into a legal one.

Mich. Compiled Laws of '99, par. 8831.



## DICTATION.

The second characteristic of this legislation is,-- certain kind of express. active trusts are allowed. In such trusts as are allowed, the trustee has the whole estate and the management of the property. The cestui quâ trust has the right to compel the trustee to execute the trust according to its terms. The effect of this statute is to change the interest of the cestui que trust from an equitable title into an equitable right.

Mich. Compiled Laws '99, par. 8844.

The express active trusts that are usually provided are the following:

- a. To sell land for benefit of creditors.
- b. To sell, mortgage or lease lands for the benefit of legatees or to satisfy a charge thereon.
- c. To receive the rents and profits of lands and to accumulate them for the benefit of married women or minors.
- d. To receive rents and profits of lands and apply them to the use of any person during life.
- e. For the beneficial interest of any person or persons when the trust is fully expressed and clearly defined upon the face of the instrument.

The provision of the Michigan Statute upon this subject may be taken as an example.

Mich. Compiled Laws of '99 par, 8839.

## DICTATION.

This legislation, as a rule does not apply to personalties.

A fourth characteristic of this legislation is that when a trust is declared in the instrument creating the legal estate, any sale, conveyance or other act in contravention of the trust is absolutely void. When the trust is not so declared it is inoperative as against a bona fide purchaser for value from the trustee without notice of the trust and is also inoperative against the creditors of the trustee. This is of a great deal of importance. When a trust is declared in a separate instrument without the trust being set out then it is an absolute conveyance to him so far as his creditors are concerned.

## DICTATION.

4th characteristic: When a trust is declared in the instrument creating the legal estate, any sale or other act of the trustee in contravention of the trust is absolutely void. If not so declared, it is inoperative as against a bona fide purchaser from the trustee and also



against the subsequent creditor's of the trustee not having actual notice of the trust.

To protect the beneficiary under a trust, the trust should be declared in the instrument creating the legal estate. When you do not do that you place yourself entirely in the hands of the trustee.

Mich. Compiled Laws '99 par. 8848-49.

Another and the fifth characteristic of this legislation: Where the trust is for the continued benefit of the party he cannot assign or otherwise dispose of his interest, and the interest cannot be reached by his creditors. This is of considerable importance in regard to the collection of debts. As a rule where the rents and profits of lands are to be paid over for the continued support of a person, it cannot be reached by his creditors. In some states that fund is exempt up to a certain sum and beyond that it is subject to execution by his creditors.

#### DICTATION.

5th characteristic: Where the trust is for the continued benefit of the party he cannot assign or otherwise dispose of his interest and his interest cannot be reached by his creditors as a rule. But where the trust is for the payment of a sum of money in gross, the interest of the beneficiary is assignable and may be reached by his creditors.

Mich. Compiled Laws (99, par. 8847.

In California the beneficiary can assign his interest unless restrained by the terms of the trust.

Calif. Code, par. 667.

6th characteristic: Trusts arising or resulting by implication of law are not abolished by this legislation.

Mich. Compiled Laws '99, par. 8854.

Pomeroy Vol. 2 1003-1005 and notes.

I desire the Mich. students to master the Chapter on Uses and Trusts.

Mich. Comp. Laws Chap. 238.

This is all I care to say about private trusts. You will remember the division of the subject into PRIVATE TRUSTS and PUBLIC or CHARITABLE TRUSTS. I come now to the second division of the subject.

#### CHARITABLE TRUSTS.

This subject of charitable trusts is of less importance in some states than others. In some states charitable trusts have been abolished. In Michigan we do not have any charitable trusts. We did have but when the statute abolished uses and trusts charitable trusts were abolished along with the rest and no new system was built up, and the statutes did not provide for charitable trusts. In many of the states you will find charitable trusts existing and a great deal of litigation has grown out of charitable trusts. In Michigan where we have no technical charitable trusts,

[illegible]

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

1. The first of these is the fact that the  
2. second of these is the fact that the  
3. third of these is the fact that the  
4. fourth of these is the fact that the  
5. fifth of these is the fact that the  
6. sixth of these is the fact that the  
7. seventh of these is the fact that the  
8. eighth of these is the fact that the  
9. ninth of these is the fact that the  
10. tenth of these is the fact that the

[illegible]



charities are administered through corporations brought into existence by statute. Statutes are passed permitting hospitals, etc. The present situation and condition of the law on this subject is explained by Pomeroy in his work on equity, in the citation which I will give you later. The charitable or public trust is of great practical importance in most of the states. In a few of the states they have been abolished by statute, and the charitable trusts in such states must possess all the essential characteristics of the private trust. In a few of the states the charitable trust has never been recognized as ever existing.

Pomeroy, p ar. 1029 and notes.

I desire you first to get a clear notion of what a Charitable Trust is. I will endeavor to give you this both by definitions and descriptions.

-----000-----

Dec. 5th, '02.



## LECTURE XXI.

---O---

In my last lecture I had just reached the subject of Public or Charitable Trusts. I said at the close of the hour that I would endeavor to give you a clear notion of what a Charitable Trust is both by description and definitions. I will first point out the chief characteristics of a charitable trust. I have said that in an express private trust there must always be a clearly identified beneficiary, but if the trust is made for public purposes it is immaterial that the beneficiary is uncertain and indefinite. In the public or charitable trust the beneficiary is a class or portion of the public described in general terms. They are indefinite and not individually designated. For example a trust for the benefit of the poor persons of a certain community; a trust for the benefit of the widows and orphans of a certain parish. The beneficiaries are uncertain, unascertained and described in a general way. Although the beneficiaries may be indefinite, still, there must be sufficient certainty to indicate the intention of the party creating the trust. A trust which would fail for want of certainty in the description of its object and the purposes of the trust, and the description of the beneficiaries, if it were an express private trust, may be upheld in a court of equity if its purposes are charitable. I should remark in this connection that charitable trusts are required to be more definite in this country than in England.

## DICTATION.

The technical Charitable Trust is characterized as follows: first, -indefiniteness as to the individual beneficiaries. The beneficiaries are usually a class of persons that is constantly changing, for example, the poor of a certain city. In case of the express private trust on the other hand, the designation of the beneficiaries must be definite. In charitable trusts there may be some indefiniteness as to the objects of the trust and still the trust may stand. The indefiniteness as to beneficiaries and as to the object may be greater in England.

Pomeroy's Equity Juris. Vol. 2, 1018-1019-1025.

Perry on Trusts, 687, 710.

There is a peculiar doctrine that grows out of the fact that the object of a charitable trust may be indefinite, which is known as the Cy pres doctrine. The Cy Pres doctrine is one under which a court of equity may act when there has been a devise or gift in trust for charitable uses which cannot be carried out exactly in accordance with the intentions of the testator. The term "Cy pres" comes from the French, and means, "as nearly as possible". The object of the trust may be unlawful or has been so indefinitely expressed that the court cannot carry it out, under circumstances of that kind, where a charitable intent is indicated



in the instrument, a court of equity may construct a scheme cy pres in accordance with the scheme outlined in the will and so carry out the charity. The charitable trust built up under this scheme must be similar in nature to the one provided for in the will. The judicial cy pres doctrine will not build up a charitable trust entirely different from the one suggested in the will. It is a doctrine by which a court of equity may make definite what a testator has failed to make definite in his will. The case of *Jackson v. Phillips*, is the leading case upon the subject in this country.

This cy pres doctrine is of importance in most of the states. It is not of importance in those states where the doctrine of charitable trust have been abrogated by statute as in the State of Michigan for example. Our trust legislation began by first wiping out all trusts in existence at the time of the passage of the statute. This legislation wiped out charitable trust along with the others. It then went to work and built up a statutory scheme of private trusts, but does not provide for charitable trusts. It provides for charities but not by way of charitable trusts.

Dictation.

The Cy Pres doctrine is peculiar to charitable trusts. It is of two kinds, the judicial and the prerogative. The word means, "as nearly as possible". The doctrine is that, where the testator has indicated a charitable intent but that intent cannot be carried out in accordance with his directions, whether on account of indefiniteness of the provisions or because of changed conditions, the court may construct a scheme, cy pres along the general lines indicated by the will for the purpose of carrying out the charitable intent of the testator.

*Jackson v. Phillips* (Illus cases page 402)

(15 Allen, 539)

*Pomeroy's Equity Juris.* Vol. 2, 1027

*Hunt, Atty Gen., v. Fowler* (Illus cases page 430)

(12 N.Y. 331)

*Fispham's Prin. of Eq.* 130.

I should suggest that this doctrine appears in England under two distinct forms. The one form is the judicial doctrine I have just described, and the other is usually called the prerogative cy pres doctrine. The Chancellor exercised the judicial doctrine by his ordinary functions. But he exercised the prerogative doctrine by virtue of royal authority and direction. This extraordinary power exercised by the English courts of equity is not exercised by any courts in this country.

Dictation.

Another branch of the doctrine is known as the prerogative cy pres doctrine according to which the court by virtue of royal prerogative constructs a scheme for charitable purposes without regard to the particular intention of the testator.



Perry on Trusts, 718.

Let me pass on to another characteristic of charitable trusts. Another characteristic is that charitable trusts are not subject to the ordinary rule against perpetuities. The law against perpetuities will not permit the tying up of property in such a way that it cannot be alienated beyond a certain period fixed by law. The period is usually fixed by statute in most states. It is usually for one life or lives in being and twenty one years. A perpetuity cannot be accomplished through the instrumentality of an ordinary trust, but a trust may be created which is perpetual for charitable purposes. A trust may be created which contemplates the payment of a certain sum to charity for ever. The very idea of a charitable trust includes the notion that it may be perpetual. Although a charitable trust may be perpetual it does not necessarily follow that the subject of the trust is never to be alienated. Whenever it becomes necessary, in the opinion of the court, to change the form of the investment, the trustee of the charitable trust may dispose of the property, but does so by virtue of the special order of the court. For example a hospital has been built for charitable purposes and it becomes desirable to change the location of the hospital, the trustee may apply for leave to dispose of the property, and to reinvest the proceeds. But in the case of a charitable trust it is understood that the property is not to be sold for ordinary purposes.

#### DICTATION.

The charitable trusts, unlike the private trusts, are not subject to the rule against perpetuities, yet, the property belonging to such a trust under the special order of the court, may be sold and the proceeds reinvested, whenever the court determines that such a sale is advisable. The proceeds of the sale under such circumstances would be used for charitable purposes.

Perry on Trusts, 736-737.

Bispham's Prin. of Equity, 133.

Pomeroy Eq., 1018.

Another particular where charitable trusts are favored by law, is that they are not subject as a rule to the Statute against accumulations. For any given purpose accumulations are not permitted beyond a certain period, which by the common law was a life or lives in being and twenty one years. It is now regulated by statute. This rule which is said to be founded on public policy would not permit a testator to give an estate to be accumulated for a time longer than the statute allowed. Trusts for accumulations must be strictly confined within the statute. But in the case of a charitable trust, a trust for accumulation beyond the common law period and the statutory period would be valid. I should, however, call your attention to the fact that there has been





legislation in this country and in England's shortening the period, and wherever there has been such provisions charitable trusts will be subject to them unless specially excepted by the provisions of the legislation.

DICTATION.

In the absence of statutes to the contrary the Charitable trusts are not subject to the rule as to accumulations. This is a matter upon which your statute should always be consulted, as in some of the states there has been changes in this regard.

Perry on Trusts, 393-399.

Odell v. Odell, 10 Allen, page 1.

I think I have given you a description of the principal characteristics of charitable trusts. In all other respects charitable trusts are governed by the same laws that regulate private trusts. You cannot fully comprehend what a charitable trust is unless you know what uses and purposes have been held to be charitable. I will explain to you what uses have been and are now held to be charitable. You have already gather from what I have said that the purpose in order to be charitable according to the meaning of the term as it is here used, must be for the benefit of some indefinite person. I have nothing to do with private charities in this connection. In explaining to you the uses and purposes that have been held to be charitable, I must refer, first, to a statute passed during the reign of Elizabeth, 1601, known as the Statute of Charitable Uses. Those uses that were deemed to be charitable in 1601 and were declared in this statute were uses that are regarded as charitable to-day. In other words the classification of charitable purposes in the Statute of Charitable Uses passed during the reign of Elizabeth is the classification of to-day. Do not confuse this statute with the Statute of Uses, they are two different statutes. The Statute of Uses was passed during the reign of Henry VIII., the Statute of Charitable Uses was passed during the reign of Elizabeth. Henry VIII in his contest against Papal supremacy practically abolished charitable trusts, many were neglected and the funds of many misappropriated. This continued until the reign of Elizabeth. Several statutes were passed for the purpose of encouraging and restoring such trusts, and the legislation finally culminated in the passage of the Statute of Charitable Uses, to which I have referred. This statute furnished to a certain extent a description of the uses and purposes to be considered charitable.

DICTATION.

The uses and purposes that are deemed by the courts to be charitable are stated in the Statute of Charitable



Uses, passed during the reign of Queen Elizabeth. The classification there given is the one followed to-day.

Perry on Trusts, 391-393 and note.

See also Important English Statutes.

The uses that were deemed charitable at the passage of this statute have been divided into three classes.

#### ENUNCIATION.

The purposes described in the Statute of Charitable Uses and were deemed by the courts to be charitable are divided into the following:-

(1) For the relief and assistance of the poor and needy. But the enumeration of the statute in this particular has been greatly enlarged by the holdings of the courts so that its spirit rather than its letter is now the rule.

(2) For the promotion of education. The specifications enumerated in the Statute is the maintenance of schools of learning, free schools and scholars in universities.

-----oOo---

Dec. 15. '01.



## LECTURE XXII.

--O--

At the close of the last lecture I was trying to explain to you the uses and purposes that were considered charitable and had suggested to you that the uses and purposes deemed by the courts to be charitable are stated in the Statute of Charitable Uses passed during the reign of Queen Elizabeth. The statute is narrow in its terms, it specifies too much in detail to be upon its face of general application, but the courts have enlarged its operation by the construction put upon it. . I was considering, I believe, the second of the uses that was specified in the statute as charitable, which is as follows: "For the promotion of education; the specification enumerated in the statute is the maintenance of schools of learning, free schools and scholars in Universities. The specification would have been much more comprehensive if it had been simply for educational purposes. It would have been no more comprehensive than it is now under the construction of the courts, for all uses that are for educational purposes are deemed to be charitable.

## DICTATION.

The language of the statute under this head is no comprehensive, but by the construction of the courts it has been enlarged so that now all uses for educational purposes using the term in a comprehensive sense are deemed to be charitable.

The third specification in the statute is for the repair and maintenance of public buildings and works. The enumeration in the statute includes bridges, causeways, sea banks, highways churches and houses of correction and the specification seems to confine the scope of the statute to the objects mentioned. But by construction of the courts gifts for bringing water into a town have been held to be charitable and many other gifts of the same character have been held to be charitable. Any provision that provides for the lightening of the burden of the public, any provision made generally for the public good are deemed to be charitable.

## DICTATION.

(3) For the repair and maintenance of public buildings and works. The specifications of the statute under this head is narrow, but the construction of the courts has made it sufficiently broad to include all gifts for the benefit of the public.

The fourth specification is for religious purposes. All religious purposes are clearly charitable. They are clearly within the spirit of the statute though not within its letter.



The provision in the statute is simply for the repair of churches. The wording of the statute has been sufficiently enlarged by the construction of the courts to include all religious uses.

Dictation.

(4) Gifts for religious purposes, the term being uses in a comprehensive sense are clearly charitable altho the provision in the statute is simply for the repair of churches.

Pomeroy's Eq. Vol. 2, par. 1020-1021-1024.

Bispham's Prin. Eq. 119-123.

Perry on Trusts, 692-698-706.

All the charitable purposes mentioned in the Statute of Uses are included under the four heads I have mentioned:

(1) For the relief and assistance of the poor and needy.

(2) For educational purposes.

(3) For public purposes.

(4) For religious purposes.

What charitable trusts are, I believe, I have made sufficiently plain by description of their characteristic features and the uses and purposes that are deemed to be charitable.

Dictation.

For a comprehensive description of charitable uses see:

Jackson v. Phillips (Illus Cases, page, 402)

According to some authorities the court of equity gets jurisdiction over matters of charity by force of the Statute of Charitable Uses, but the more correct conclusion is that the jurisdiction is possessed by virtue of the court's inherent power, that the statute simply regulates the jurisdiction and defined more distinctly the classes of objects that are charitable.

Williams vs. Williams 8 N.Y. 525.

Gould v. Washington Hospital, 5 Otto U.S., 303.

Perry on Trusts, 693-694.

Pomeroy's Eq. 1028.

In several states charitable trusts are not found because they have been abrogated by legislative enactments. This change began in the state of New York. The legislature first abolished all trusts and confidences in land and then the statute proceeded to build up a statutory system of trusts. The abrogation of all trusts abolished charitable trusts and in building up a statutory system of trusts charitable trusts were not included. The legislation in New York was followed in Michigan and several other of the western states. This is a subject upon which you should consult your local statutes. But in the state of New York and the state of Michigan where trusts technically considered, have been abolished and no provision made for technical





charitable trusts, you will find provisions for charitable uses through the medium of corporations that are established by the legislature for charitable purposes. The New York legislation upon this subject is somewhat peculiar. You all remember the Tillman will case; by the provisions of the will large sums were apparently set aside for the establishment of a public library in New York, but there was so much uncertainty as to how his intention was to be carried out and so much uncertainty as to the trustees, that the court of New York decided that it was impossible to administer the charity under the provisions of the statute then in force in New York. Had there been no statute upon the subject of charitable trusts in the state of New York, if the court had been free to apply the cy pres doctrine there would have been no difficulty in saving the proceeds for charitable purposes that Tillman had in mind, under the circumstances it could not do so, and the will failed. Undoubtedly this Tillman will case which came before the court about that time suggested to the legislature of New York that there ought to be some change, so in 1893 a brief statute was passed by the Assembly of New York that put back into force in that state the cy pres doctrine to its fullest extent. I think undoubtedly that similar legislation will follow in other states. In mind mind the cy pres doctrine is a safe doctrine and a necessary one.

#### DICTATION.

In several of the states charities are made effective through the medium of corporations provided for by the legislature. This is the case in the state of New York for example, in that state by recent statute the cy pres doctrine has been revived.

Allen v. Stevens, 161 N.Y. 122(Illus Cases 423)

#### IMPLIED TRUSTS.

I will pass on to the second great division of trusts, namely, trusts arising by implication of law. Trusts of this kind are generally called implied trusts. The law implies these trusts from the conduct of the parties.

#### DICTATION.

Implied trusts are distinguished from express trusts because they are raised by the law and not by the agreement of the parties. The law raises trusts of this kind either for the purpose of carrying out the presumed intention of the parties or for the purpose of securing fair dealing between the parties.

Another characteristic is found in the fact that in the case of implied trusts there is a notion of antagonism between the trustee and the beneficiary. The object of the

1. The first part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the English language over time. The study of the history of the English language is important for several reasons. First, it helps us to understand the development of the English language and the factors which have influenced it. Second, it helps us to understand the relationship between the English language and other languages. Third, it helps us to understand the role of the English language in the world.

2. The second part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the English language over time. The study of the history of the English language is important for several reasons. First, it helps us to understand the development of the English language and the factors which have influenced it. Second, it helps us to understand the relationship between the English language and other languages. Third, it helps us to understand the role of the English language in the world.

3. The third part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the English language over time. The study of the history of the English language is important for several reasons. First, it helps us to understand the development of the English language and the factors which have influenced it. Second, it helps us to understand the relationship between the English language and other languages. Third, it helps us to understand the role of the English language in the world.

beneficiary is to put an end to the trust relation at the earliest possible moment. In the case of express trusts there is a certain degree of permanency to the relation.

There is another characteristic by which implied trusts may be distinguished from express trusts, they are not subject to the statute of Frauds. One section of the statute provides that all trusts in relation to land must be manifested and proved by some writing. But the statute does not apply to trusts in personalty and such trusts may be manifested and proved by parol. The courts will insist upon clear and almost demonstrative proof, it will look carefully to the quality of the evidence but it will not insist that trusts in personalty be proved by some writing.

#### DICTATION.

Another characteristic is that they are not within the provision of the Statute of Frauds.

As to these characteristic differences that I have been speaking of, see:--

Pomeroy, Vol. 2, 1030.

#### DICTATION.

All implied trusts are divided into two classes:--

(1) Resulting Trusts.

(2) Constructive trusts.

A resulting trust is one that results by operation of the presumption of law from certain acts or relations of the parties that indicate an intention to create a trust. You cannot put your finger upon an particular word by which the parties declared that they intended to create a trust but when you take into consideration all the acts of the parties in connection with the transaction it is perfectly apparent that they intended that a trust relation should exist and under such circumstances the court will raise the relation. A party may execute a conveyance absolute upon its face, wherein no provision is made for a trust, which passes the legal title directly, but yet the circumstances surrounding the execution of the conveyance may be such as to indicate to a fair minded man that the party making the conveyance intended to retain some beneficial interest in the property and under such circumstances the court will raise a trust between the parties.

#### DICTATION.

The resulting trust is one that the law raises from the acts or relation of the parties. The acts or relations of the parties are such that one may properly conclude that a trust was intended by them. The resulting



trust is a trust that the law presumes on account of surrounding circumstances. Resulting trust may be divided into the following classes:--

(1) This class embraces cases where one party has furnished the consideration and the legal title to the property has been taken in the name of another under such circumstances in the absence of statute to the contrary a trust results in favor of the party furnishing the consideration.

---(oOoo)--- Dec. 18th "02.



## LECTURE XXIII.

--oO--

In order that a trust may arise the advancement must be made as a consideration, not as a gift or as a loan. If the advancement is made by several a trust will arise in favor of all of the parties making the advancement each in proportion to the amount advanced. If a party advances to another the consideration for the purchase of real property and he makes the purchase and takes the title thereto in his own name, but contrary to the directions of the one furnishing the consideration a trust will arise, but the trust in this case is a constructive trust instead of a resulting trust inasmuch as it is based upon fraud.

If the party furnishing the consideration has the conveyance of the legal title taken in the name of wife or child or other person for whom he is under some obligation to provide, the presumption is that the purchase was intended as an advancement to the grantee in the deed. If the party paying the consideration claims a resulting trust he must rebut this presumption by proper evidence.

Perry on Trusts, par. 143-169.

Pomeroy's Eq. Juris. Vol. 2, par. 1039-1041.

Bispham's Prin. Eq. 84.

Hagan v. Powers (Illus. Cases, 451)

(72 N. W., 771; 103 Iowa 593)

The resulting trust that arises in favor of the party furnishing the consideration has been abolished by legislation in several of the states. That is the case in New York, Kentucky, Wis., Kan. and Mich. and several of the other states. But this legislation provides for a trust in favor of the creditors of the party furnishing the consideration. But it is only judgment creditors that can take advantage of this situation, and they can only do so after having returned the legal execution unsatisfied. They take advantage of the situation through the instrumentality of the creditor's bill.

Fisher v. Foles (22 Mich., 454)

Ocean Nat'l. Bank v. Olcott (46 N. Y. 12)

The second class into which resulting trusts are divided embraces cases in which property has been left by will or conveyed by deed for some particular purpose or trust and these purposes fail in whole or in part, or which are of such indefinite nature that courts of equity will not carry them into effect, or which are illegal in their nature or character, in each of these cases the consideration remaining undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself or his heirs at law or next of kin





according to the nature of the estate. If the gift is void because it violates some statutory provision, or for some illegal purpose a trust to the extent of the estate given will result to the donor or his heirs or legal representatives.

Perry on Trusts, 160.

Skellenger's Ex'rs. v. Skellenger's Ex'rs.  
(32 N. J. Eq. 659; Illus cases 434)

Bond v. Moore (Illus. Cases, 436)  
(90 N. C., 239)

-----oOo-----

Dec. 19th '02.



## LECTURE XXIV.

I think I have said all I desire to say upon the subject of resulting trusts. As you remember we divided all resulting trusts into two general classes. One class comprised all those cases where the consideration was paid by one party and the legal title taken by another, there a trust resulted in favor of the party furnishing the consideration. The second class embraces those cases where a trust was attempted, but for some reason failed, under such circumstances a trust will always result in favor of the party entitled to the property.

## DICTATION.

Trusts under this head usually arise from voluntary disposition. The intention of the testator or grantor that a trust should be raised must be gathered from the terms of the instrument by which the property is conveyed and the surrounding circumstances. If it appears that the property is conveyed expressly for a certain purpose and that purpose cannot be accomplished for some reason, then a trust will result. If it appears that the property is conveyed simply subject to certain conditions that do not take place, then no trust results, but the grantee takes the property absolutely.

Pomeroy's Eq. Juris. Vol. 2, par. 1033.

Perry on Trusts, 157-160.

I will now take up the discussion of the ~~xxx~~ second of the two general classes of trusts arising by implication of law, namely, constructive trusts. In the resulting trust the intention to create a trust is an essential element even though no intention is expressed in direct words in the instrument. The intention is inferred from the terms of the instrument or the accompanying facts. In constructive trusts fraud is the essential and fundamental element.

## DICTATION.

In the resulting trust the intention is the basis of the trust; in a constructive trust fraud is the essential and fundamental element.

Pomeroy's Eq. Juris. Vol. 2, par. 1044.

Constructive trusts are trusts which equity raises for the purpose of working out justice where the legal title to property has been obtained through fraud of the rights of the person equitably entitled to the property and when the property is held in hostility to such rights. If a person occupying a trust relation to another by means of the undue influence he is able to bring to bear upon the other secures certain advantages and gets property



from the party occupying the subordinate position, even though the legal title to the property may be formally given him, equity will say that he must hold that property as trustee for the benefit of the defrauded party. Equity has large jurisdiction in this matter of trusts. The remedies that it can furnish are broad and comprehensive in their nature. There are legal remedies that can be pursued in case of fraud in causing property to be transferred from one to another, but in many cases these legal remedies prove to be inadequate. The equitable remedies which have been devised for remedying irregularities in regard to trusts are very broad in their nature. Really in case of constructive trusts there is no trust, but cases of this kind are based upon fraud. But the equity courts, whenever a person by means of undue influence takes advantage of and defrauds another and thus gets possession of his property, will make of him a trustee of the property who thus obtains the legal title for the benefit of the defrauded party, for the reason that thereby courts of equity can apply those remedies that are much more broad and comprehensive than the legal remedies in such cases.

#### DICTATION

In case of the constructive trust the real basis is fraud. The trust relationship is raised by equity simply for the purpose of obtaining a relationship over which the court has complete control and jurisdiction. There is in reality no trust; the trust is constructed by the courts for the purpose suggested. The relation is really based upon fraud. The remedies furnished by equity when once the trust relation has been raised are much more comprehensive and far reaching than any that are given by a court of law simply on the ground of fraud.

Pomeroy's Eq. Juris. Vol. par. 1044.

Perry on Trusts, 166.

In order to present the subject somewhat in detail I will divide such trusts into several general groups or classes. The same principle runs through all these classes, but still these trusts are naturally divisible into these classes I will suggest.

#### CLASSES OF CONSTRUCTIVE TRUSTS.

The first class I wish to discuss comprises those cases where money has been obtained by a party that does not equitably belong to him. Under such circumstances a trust is raised in favor of the party equitably entitled to the money. Suppose a person standing in a fiduciary capacity has got possession of money that equitably belongs to the subordinate party, equity will at once make of him a trustee of that money for the benefit of this person and compel him to account to the person defrauded. Suppose



money has been paid by mistake of fact as to liability for payment, under such circumstances the party receiving the money upon demand for the return and refusal makes of himself a wrong doer and a constructive trust is raised at once. In most of the states it would be possible to bring an action of assumpsit and get judgment against the party. This is possible because the equitable principles have got into the law and is so enforced by reason of the influence of equity upon the law. The action of assumpsit is one of the equitable actions of the law. But sometimes it becomes desirable and absolutely necessary if you are to secure anything of benefit for your client to go on to the equity side of the court, because you can only get a judgment for damages on the law side of the court, while in a court of equity you can subject to the processes of the court the money itself or the proceeds of the money. If a man has money in a safe he can keep it there and it is usually out of the way of a legal execution, but he cannot keep it beyond the reach of the searching processes of a court of equity.

## DICTATION

(1) When money has been obtained by a party that does not equitably belong to him, a constructive trust is at once raised in favor of the party who is beneficially entitled to it. For example, a trust may be raised in regard to money that has been paid by mistake of fact, if the party to whom it has been paid fraudulently refuses to account for it. The fact that at the present time a party may sue at law for the money so obtained does not take away equity jurisdiction. We are frequently obliged to go into a court of equity in order to make use of its processes for reaching the identical money or its proceeds.

The second class embraces those cases where property which is in fact impressed with a trust is transferred by the trustee in violation of his duty to a mere volunteer or a purchaser having notice of the trust relation, then such a transferee takes the property subject to the same trust that before existed. A trust of this kind is one that the law raises for the protection of the beneficiary.

## DICTATION

(2) class embraces all of those cases in which property that is impressed with a trust is transferred by the trustee in violation of his duty to a mere volunteer or to a purchaser with actual or constructive notice of the trust.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that proper record-keeping is essential for transparency and accountability, particularly in financial matters. The text suggests that organizations should implement robust systems to track every detail, from small expenses to major investments.

2. The second part of the document addresses the challenges of data management in a rapidly changing environment. It highlights the need for flexible and scalable solutions that can adapt to new technologies and evolving business requirements. The author argues that investing in modern data infrastructure is not just a technical necessity but a strategic imperative for long-term success.

3. The third part of the document explores the role of data in decision-making. It argues that data-driven insights are crucial for identifying trends, opportunities, and risks. The text provides examples of how organizations have successfully used data analytics to optimize operations and improve customer experiences. It also warns against the pitfalls of data overload and the importance of focusing on relevant information.

4. The fourth part of the document discusses the ethical implications of data collection and use. It stresses the importance of protecting personal information and ensuring that data is used in a responsible and transparent manner. The text references various regulations and standards that govern data privacy and security, and it encourages organizations to adopt a proactive approach to ethical data management.

5. The fifth part of the document concludes by summarizing the key points discussed. It reiterates the importance of accurate record-keeping, effective data management, data-driven decision-making, and ethical data practices. The author encourages organizations to embrace these principles as a foundation for sustainable growth and innovation.



In such cases the transferee takes the property subject to the same trust that before existed. The express active trust is by the transaction changed into a constructive trust.

Pomeroy's Eq. Juris. Vol. 2, par. 1048.

When a person acting in a fiduciary capacity purchases property with trust funds and takes title in himself without any declaration of trust, equity raises a trust in favor of the real beneficiary. If an agent purchases property with his principal's funds, equity raises a trust in favor of the principal. In cases of that kind equity raises a trust without evidence of the intention to violate the relation, in accordance with the maxim that equity imputes an intent to fulfill an obligation. As a matter of fact the intention is directly opposite from that presumed by the court of equity.

#### DICTATION

(3) When a person acting in a trust capacity purchases property with trust funds and takes title thereto in his own name without disclosing the trust in the instrument of conveyance, a trust is raised by construction in favor of the person beneficially entitled. This trust is called by some a resulting trust for the reason that in the absence of fraud it is raised as the result of a presumed intention. As a matter of fact, however, in most cases of this kind we find fraud either actual or constructive and so the trust is properly called a constructive trust. The doctrine applies to trustees proper, executors, guardians, partners purchasing property with partnership funds, in fact to all persons who stand in a fiduciary relation towards others.

Ferris vs. Van Vechten (Illus Cases page 453)

Ward v. Armstrong (84 Ill, 151.

45 Maine, 52.

The fourth class is an important one because we very frequently meet with cases falling under it. This class embraces cases where a member of a partnership without the knowledge and consent of his copartners has taken a renewal lease for his own benefit of the premises occupied by the firm as tenants. Take for example the case of Mitchell v. Read (Illus cases page 472): Here two partners had leased and occupied, for hotel purposes, the Hoffman House in New York; they spent considerable amount of money in furnishing the house and making valuable improvements and largely enhanced the rental value of the premises. Just before the expiration of the lease of the property one of

1890

1891

1892

1893

1894

1895

1896

1897

1898

1899

1900

1901

1902

1903

1904

1905

1906

1907

1908

1909

partners obtained a renewal lease in his own name, for terms commencing at the expiration of the partnership leases. Equity under such circumstances said that it was a fraud upon the other partner for the one partner to get the entire control of the property. Equity under such circumstances says, "You have the legal title but we will make of you a trustee of the lease for the benefit of the partnership."

## DICTATION

(4) If a member of a partnership without the knowledge and consent of his copartners has taken a renewal lease for his own benefit of premises occupied by the firm as tenants such lease will innure to the benefit of the whole firm. The party getting the lease is made a constructive trustee thereof for the benefit of the firm.

Mitchell v. Read (Illus Cases page 472)

Pomeroy's Eq. Juris. Vol. 2, par. 1050.

Perry on Trusts, 196.

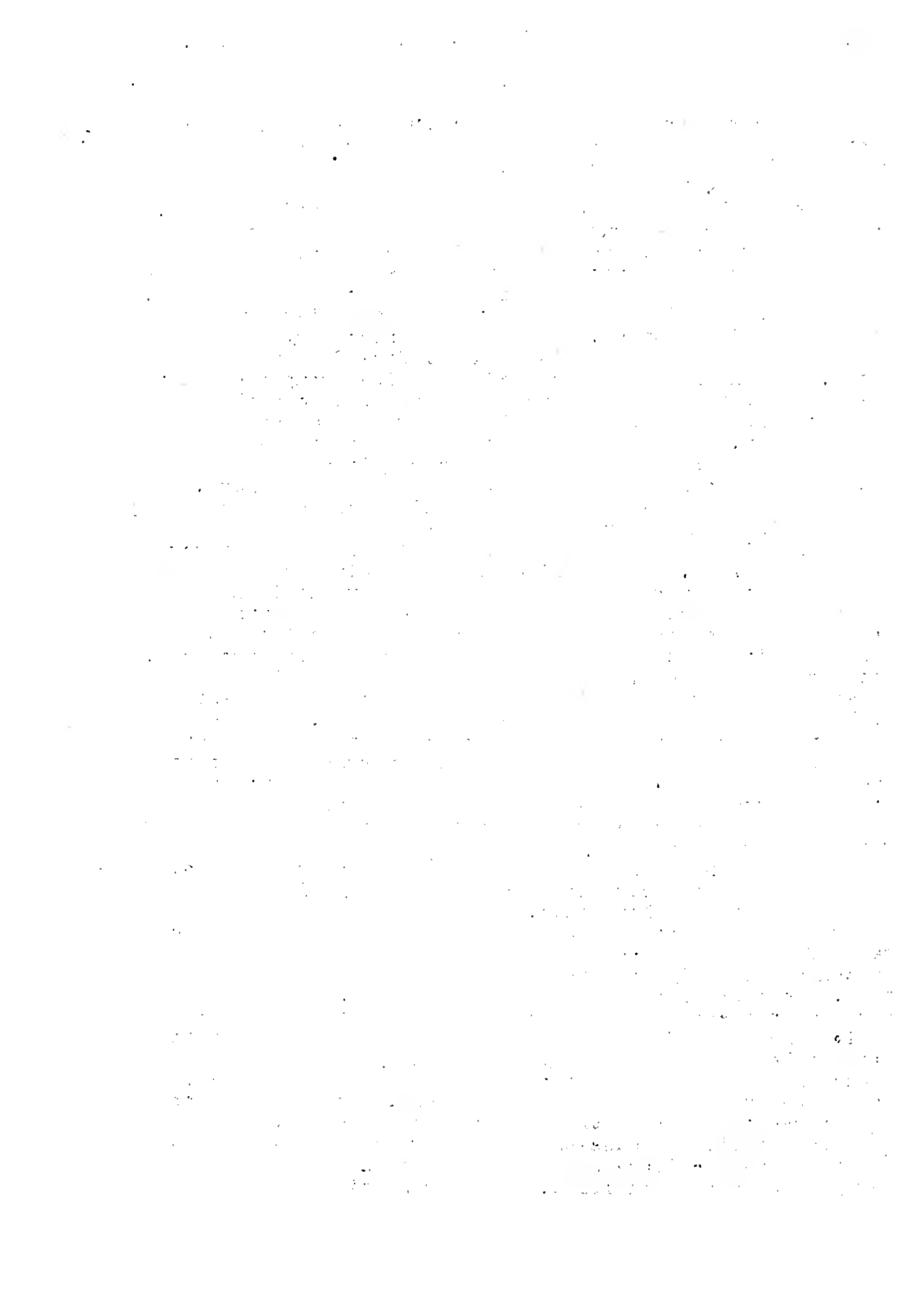
-----oOo-----

Jan 8th '03.



## LECTURE XXV.

Whenever there has been a wrongful appropriation or conversion into a different form of another's property a constructive trust arises in favor of the person who has been defrauded. The conversion may be made by one who is a trustee or by one not occupying a trust relation at all. In the constructive trust of this kind a wrongful intent is always present. In such cases the party converting the property of another into a different form intends to violate the fiduciary duty and to commit a wrong towards the other. In such cases an intent to violate the fiduciary relation is an essential element. It is in this necessary presence of wrongful intent that this group differs from the third group. In constructive trusts of the third group the court assumes that the person is acting in accordance with the terms of the trust, it does this by force of a maxim well known to you. In constructive trust under this head we are now considering an intentional wrong is always apparent and there is no room for an assumption to the contrary. If it appears that an agent has wrongfully securities belonging to his principal and purchased property in his own name, a constructive trust of this kind will be raised in favor of the principal. The doctrine as I have already suggested is capable of wider application. If a party who is not acting in a fiduciary capacity fraudulently converts property of another into a new form a constructive trust will be raised and attach to this property or its proceeds. The case of *Newton v. Porter* is a good illustration of constructive trust of this class where there is not established fiduciary relation between the parties. It seems that in this case public securities were stolen and that the person who had appropriated them afterwards negotiated these securities to an innocent purchaser for value and received from that purchaser certain securities. When arrested and proceeded against on the civil side they retained certain attorneys to defend them and turned over to these attorneys as a consideration for their services, certain of these securities that they had received from the sale of the stolen bonds. The attorneys took the securities with notice that they were the proceeds of the sale of the stolen bonds or had such knowledge of the facts as would naturally lead them to believe that such was the case. The court said that these attorneys must be held to have taken these securities with notice of the whole transaction and made of the attorneys trustees of these securities for the benefit of the party defrauded by the theft of the bonds and compelled the attorneys to assign the securities to the party equitably entitled to them. Now property or its proceeds by virtue of the trust relation that I am at the present time discussing, may be traced through various forms and may be impressed with a trust in favor of the party beneficially entitled. It makes no difference how



extensive the change so long as identification is possible. Identification of the species is not necessary, but identification of the substance is sufficient; so long as that is possible the trust may be raised. Actual identification is sometimes impossible because the property has been lost in a larger mass, but if you can show that the property has gone into the mass and still remains there, under the modern rule this is sufficient to raise the trust. Where the property has gone into the hands of a bona fide holder or purchaser for value without notice, then the property cannot be followed. The underlying principle is fraud, but the fraud in this case is not inferred fraud, but actual fraud that can be shown and that is open and palpable.

#### DICTATION

(5) Whenever there has been a wrongful appropriation or conversion into a different form of property belonging to another a constructive trust arises in favor of the party who has been defrauded. In the cases falling under this head there must appear an intent to violate the fiduciary duty or acts that result in the fraudulent obtaining of property belonging to another. Although the cases are usually those in which a fiduciary relation exists, yet, they are not necessarily so. If a party not acting in a trust capacity fraudulently converts the property of another into a new form, a constructive trust is raised and attaches to the property or its proceeds so long as they can be identified and have not passed into the hands of a bona fide purchaser for value and without notice.

Newton v. Porter (Illus cases page 469) 69 N.Y., 133.

31 Calif 17.

Pomeroy Eq. 2, 1057.

A constructive trust of the kind under consideration frequently arises under circumstances of great practical importance. It was in the year 1869 or thereabouts that the English Court of Chancery in a case in which Sir Geo. Jessel gave the principal opinion, decided that in tracing trust property a trust would result if the property itself or the immediate proceeds could be identified. Previous to this decision it was held that where trust property was gone for instance it could not be traced after it had passed out of the hands of the trustee and had gone into a larger mass for the reason that money has no ear marks, therefore there is no way of identifying the particular money. So if money got into a larger mass the means of identification were gone and the beneficiary cannot follow the property any longer, but must rely upon the personal liability of the trustee. In this case it appears that a bailee of certain funds had deposited those funds in a bank to his own credit and after his death the beneficiary sought to have the property impressed with a trust in his favor. The defense was that the money having gone into a larger mass could not be identified and therefore no trust could be impressed upon it and the party was relegated





in his action to a suit against the estate of the trustee. But the court in this case said, that is the old doctrine of equity, but we have got beyond that doctrine, and we propose to make a departure. The court held that wherever you can identify trust property as having gone into a larger mass and that it has not gone out of the mass you are in a position to impress the mass with a trust to the extent of your property. A case arose in the state of Wisconsin in which a man who had been accustomed to deal with a local bank stepped into that bank one day with a draft on Chicago and said to the banker he wanted the cash for it; the banker said that he could not pay it that day but he would take the draft and send it for collection and for the man to come in in the course of a few days and he would pay him the cash. The man said all right and gave him the draft and took an ordinary receipt in return. By the transaction a special deposit was created for the collection of the draft. The banker sent the draft to Chicago and asked the Chicago correspondent to please credit him with the draft, which the Chicago correspondent did and he then proceeded to draw against the fund in Chicago and by his checks to pay his individual indebtedness. The owner of the draft called in a few days and was put off by the banker saying that he would pay him in a few days, returning one day he found the bank closed. The question came up who was to stand the loss. The man that left the draft claimed that under the circumstances a trust relation existed between the banker and him with reference to that draft and its proceeds; that the bank received the draft for collection when it new it was in a failing condition and instead of collecting it deposited the draft to his own account. And so raises a constructive trust in regard to the draft in favor of the owner. The attorneys for the defense said that is good law, we do not object to that, but in order that you may impress the proceeds of the draft with this constructive trust, you must first find them. It appeared when the proceeds of the bank were looked into that there was only about two hundred dollars cash; the proceeds of the draft had all been used up. The attorneys for the defense said it must be shown that the property is identified or it must be shown that the property has gone into a larger mass and still remains there. The attorneys for plaintiff said, that is not necessary, that is not in accordance with the reasoning of Sir George Jessel. It is not necessary to trace them into a larger mass if we show that the proceeds of the draft have been used by the debtor to pay his individual debts, he has by that process to that extent enlarged his general estate and so having enlarged the estate to that extent the estate should be impressed with a trust. The court here

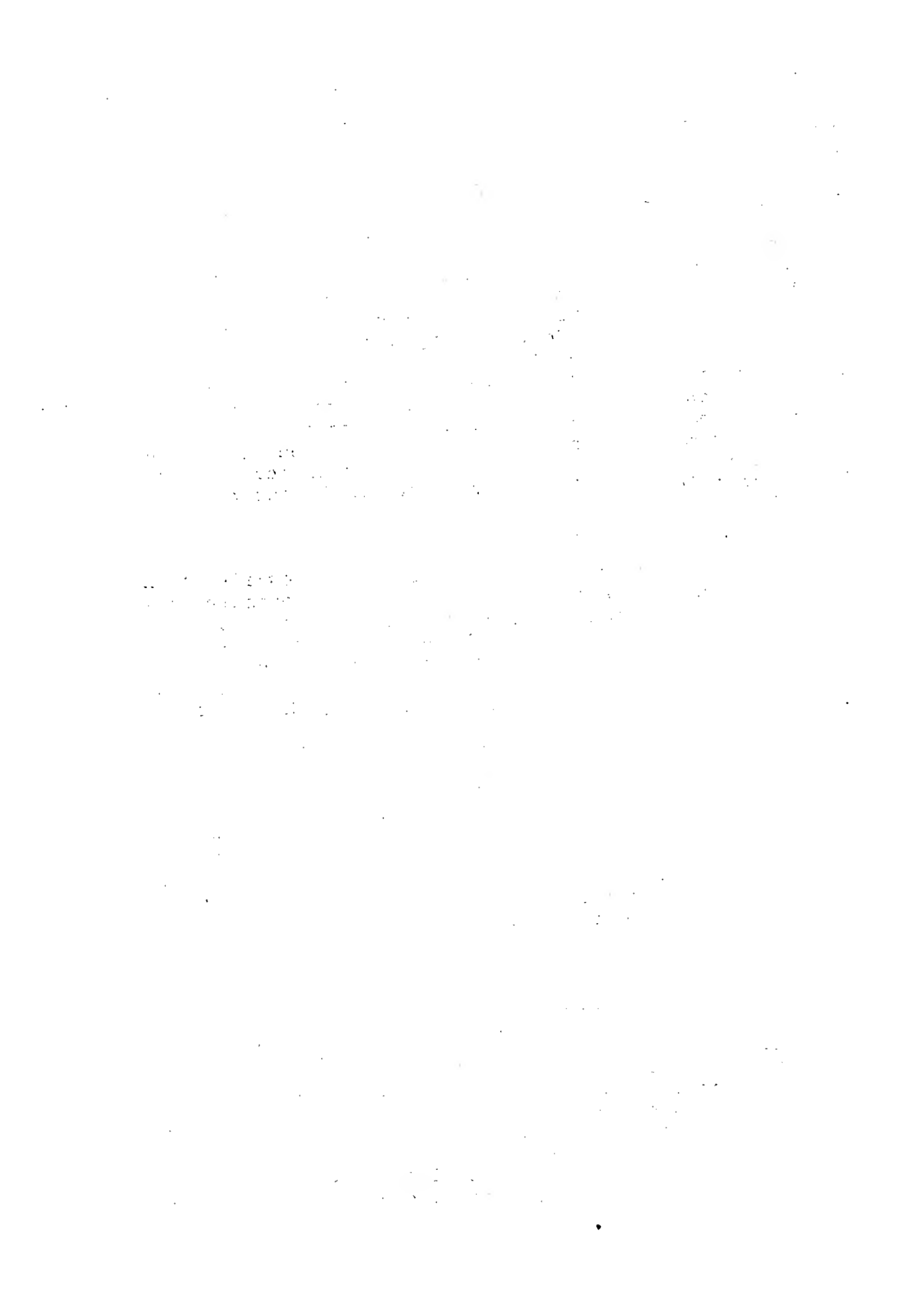


HELD THAT UNDER THOSE CIRCUMSTANCES THE GENERAL ESTATE OF THE RECEIVER WAS impressed with a trust in favor of the owner of this draft and to the extent of the draft with interest and that he was a preferred creditor to that extent. This decision was carrying the case farther than the English Court carried it. There was a previous case in New York in which it was thought the court carried the doctrine to this extent, and undoubtedly had its influence on the Wisconsin case. A year or two later after the decision in Wisconsin a case arose in the state of New York in which the Court of Appeals said that the profession had misunderstood the former case and laid down what it considered the rule in this regard, which is this: "You can impress property with a trust where you can show the trust property or its proceeds have gone into a larger mass and remain in that mass even though the particular property itself cannot be identified and that is the doctrine that is supported to-day by the weight of authority.

#### DICTATION.

Constructive trust of the class under consideration frequently arise where commercial paper is deposited with a bank for collection and the proceeds of the paper are misappropriated by the bank. Under such circumstances if it appear that no part of the proceeds passed into the hands of the receiver the person depositing the paper will be simply a general creditor, if, however, the proceeds are in the hands of the receiver the depositor is a preferred creditor. The principle is this, property impressed with a trust will be preserved by the court for the benefit of the cestui que trust so long as the property or its proceeds can be traced even though the proceeds form a part of a larger mass. Trust money for example may lose its identity by being deposited with general funds of the trustee but under the modern holding, the general fund, if the trust money still remains there, will be impressed with a trust to the extent necessary for the protection of the beneficiary.

I should not leave the subject before suggesting that the course of reasoning in the state of Wisconsin is rather an interesting one. The court in this case was a divided court, the majority, however, sustained the extreme doctrine. A few years later another case came up and this doctrine was again sustained, but in this case Judge Cassidy who led the opposition to the doctrine got one more judge on his side. And then a third case came up and the holding of the court was the same. And a fourth case came up and by that time Judge Cassidy succeeded in getting another Judge on his side and the court turned



around and repudiated the doctrine laid down in the 66 of Wis. 401. But still one judge held out upon the ground that the effect of the repudiation of the former doctrine upon the commercial conditions would be such that a change was unwise. At the present time this case in the 66 Wis, is no longer law.

Slater v. Oriental Mills' Illus cases page 458)  
18 R.I., 352)

Nonotuck Silk Co v. Flanders (Illus Cases, 460)  
(87 Wis, 237)

American Sugar Refining Co. v. Fancher  
(Illus. Cases, 463; 145 N.Y. 552)

Cavin v. Gleason (illus. Cases, 467)  
(105 N.Y., 256)

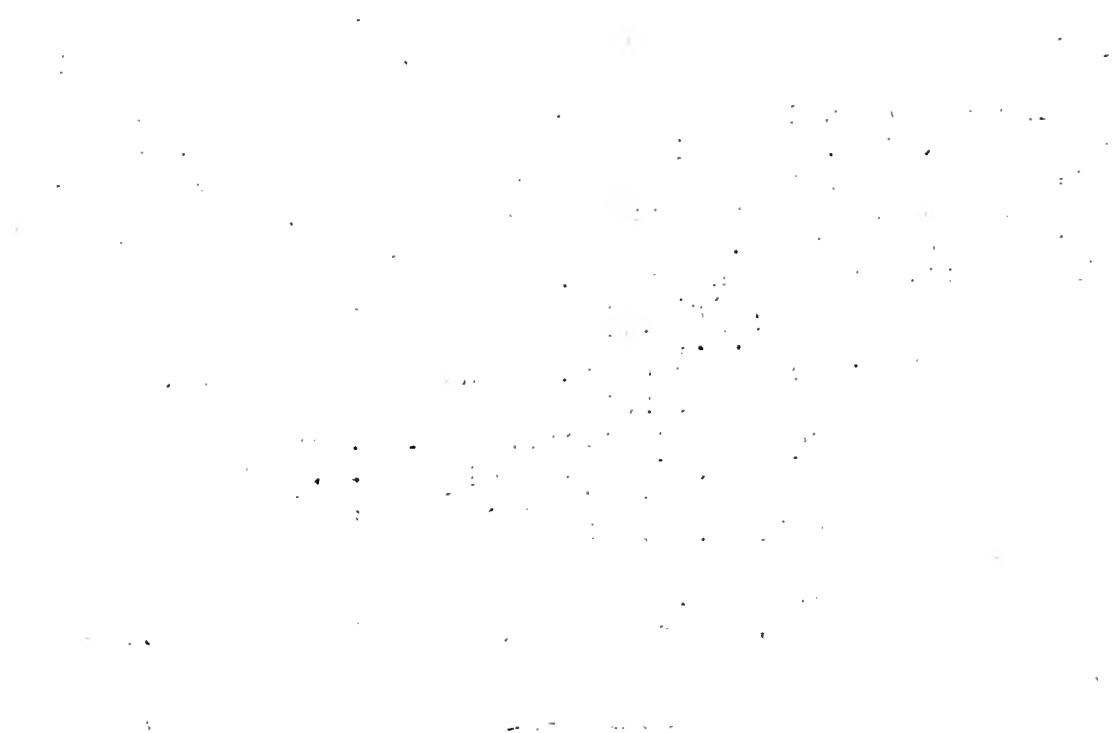
Contra.

66 Wis., 401.

Meyers v. Board of Education (32 Pac Rep., 268)

-----oOe-----

Jan 9th '03.



## LECTURE XXVI.

--0--

I was speaking to you at the close of the last lecture upon the subject of tracing trust funds and had left the matter in a rather unsatisfactory condition. The old rule in regard to the tracing of trust funds was that the trust property could only be impressed with with a lien in favor of the cestuy que trust when the trust property can be specifically identified. That rule is not in force now in any of the states. This rule was changed to the following: courts will subject trusts funds to the lien of the cestuy que trust so long as the funds themselves or the profits or proceeds thereof could be identified. This lien would not attach if the funds had got into the hands of a bona fide purchaser for value and without notice. This is the rule generally followed in this country whenever trust funds have been misapplied or dissipated by the trustee. In some of the states the rule has been still further liberalized which follow the famous English case that was decided in the eighties in which Sir George Jessel first took the position that identification either in species or in the proceeds was not necessary. That it was sufficient if substantial identification be made. That money, which the courts had always said had no ear marks, and could not therefore be identified if mixed with a larger fund, may be identified in this way, by the court imposing a special lien upon the larger sum to the extent of the money which had gone into it. That is the rule in most of the states. I tried to illustrate this rule by referring to several banking cases where commercial paper had been left for collection; under such circumstances if the paper is simply left for collection, the ordinary banking relations of debtor and creditor is not raised, but the relation between the bank and the one depositing the paper for collection is one of trustee and cestuy que trust. That relation exists particularly if the bank is in an insolvent condition at the time the paper was received for collection. If subsequently the banker attempts to misappropriate the funds to the payment of his own indebtedness, a constructive trust arises in favor of the party depositing the paper for collection. Some of the Western states went so far as to hold that if the proceeds of the draft were used for the payment of the banker's individual indebtedness, that his estate was thereby so much increased and a lien should be imposed upon his estate in the hands of the assignee irrespective of the fact that none of the proceeds of the draft had gone into the hands of the assignee. But this doctrine has been repudiated in most of the states and is no longer law.

Albany Law Journal Vol. 48,20,page 384.





Whenever a trustee or person acting in a fiduciary capacity acquires the title or beneficial use of property by taking advantage of the trust relation equity impresses a constructive trust upon the property in favor of the cestuy que trust. A trustee has no right to purchase property directly from the cestuy que trust. Purchases of that kind are constructively fraudulent. I do not mean that a sale of that kind will never be sustained, but it is constructively fraudulent. The burden is then cast upon the trustee to show that the transaction is open and above board and was made upon a full consideration and was made with a cestuy que trust who was entirely competent of understanding the situation of the parties and the relation of the property. Dealings between the trustee and the cestuy que trust are presumably fraudulent that result in the transfer of property to the trustee and the trustee is changed from an express trustee to a constructive trustee.

#### DICTION

(6) Whenever a person acting in a fiduciary capacity or a trustee acquires the title and beneficial use in the trust property itself or realizes a benefit therefrom by taking advantage of the trust relation, equity impresses a constructive trust upon the property or profits in favor of the original beneficiary. It is improper for the trustee to purchase trust property from the beneficiary. Such a transaction is constructively fraudulent.

Pomeroy Vol. II, 1055.

Perry Trusts, 194-5.

There is one more class of constructive trusts which is a large and comprehensive class. These trusts are sometimes called trusts ex delicto. They arise out of actual positive wrongdoing. There are trusts that arise through actual fraud, undue influence, the taking advantage of the weaknesses or necessity of a party and in similar ways. . . If a person procures a bequest to be made in his name instead of some other person whom the testator intended to benefit and does this by means of promises and assurances that he will apply the bequest to the benefit of such other person and after the death of the testator refuses so to do and insists upon keeping the property for his own benefit, under such circumstances equity will make of him a trustee for the benefit of the person whom the testator intended to have the benefit of the property. Constructive trusts under this head may arise under circumstances like the following: A man's property is about to be sold under a mortgage or under execution and the debt for which it is to be sold is much smaller in amount than



the value of the property. He goes to the mortgagee and says, "I do not want to go around and find somebody to bid off that property, if I can get a little more time I can pay the debt, and what I want is that you will take the title to that property on the sale and hold it for me until such a time as I can make payment of the debt, say two years from this date." The other party says very well, I will do that for you and bids in the property. The deed is made directly to him and when the two years come round the mortgagor goes to the mortgagee and says to him I am ready to redeem the property. The mortgagee says, "You can't redeem the property for it belongs to me." "You cannot enforce an oral agreement for the transfer of real estate." Of course an oral agreement is not binding for the transfer of real property, but you can call upon the processes of equity and compel him to transfer the property to you, basing the action not upon the oral promise, but upon the fraud. There is nothing that will uplift and displace the Statute of Frauds as will fraud itself because the Statute of Frauds will never be enforced when the effect will produce fraud.

## DICTATION

(7) The last class of constructive trusts are called trusts ex delicto; trusts that arise through actual fraud, misrepresentation, concealments, undue influence, the taking advantage of the weaknesses or necessity of a party and similar ways.

Ryan v. Dox(Illus Cases, 480)

(34 N.Y., 307)

Edwards v. Culbertson(Illus. Cases 485)

(111 N.C. 342)

In re O'Hara(Illus Cases, 487)

(95 N.Y. 403)

Curdy v. Berton(Illus. Cases, 493)

( 79 Cal. 420)

## DICTATION

There are a few trust relations that are not susceptible of a classification that will bring them under any of the well known heads. It is perhaps best to speak of them as improper trusts. I refer to the trusts existing between vendor and vendee, between partners, or in regard to surviving partners.

Pomeroy Eq. Vol. 2, 1046.

Before leaving the subject of constructive trusts I wish to impress upon you that equity regards the cestuy que trust as the real owner and entitled to all the rights and consequences of ownership of the trust property in case of constructive trusts. The effort of the beneficiary is always to put an end to the trust relationship at the



earliest possible moment.

I will now pass on to the next subject, namely, the powers, duties and liabilities of trustees generally.

THE POWERS? DUTIES AND LIABILITIES OF TRUSTEES GENERALLY

The responsibilities and duties of the trustee begins with the acceptance of the trust. Acceptance may be formal, that is, in writing, either by indorsement upon the trust instrument or in a separate instrument or it may be informal, that is, by taking possession of the trust property. When a trust has once been accepted the relation cannot be repudiated by the trustee. He can be released from the trust relation then, only by direction of the court or by the consent of the parties interested. The trustee may always refuse to accept and it is his duty to do so if there is any reason that he cannot act for the best interests of the beneficiary.

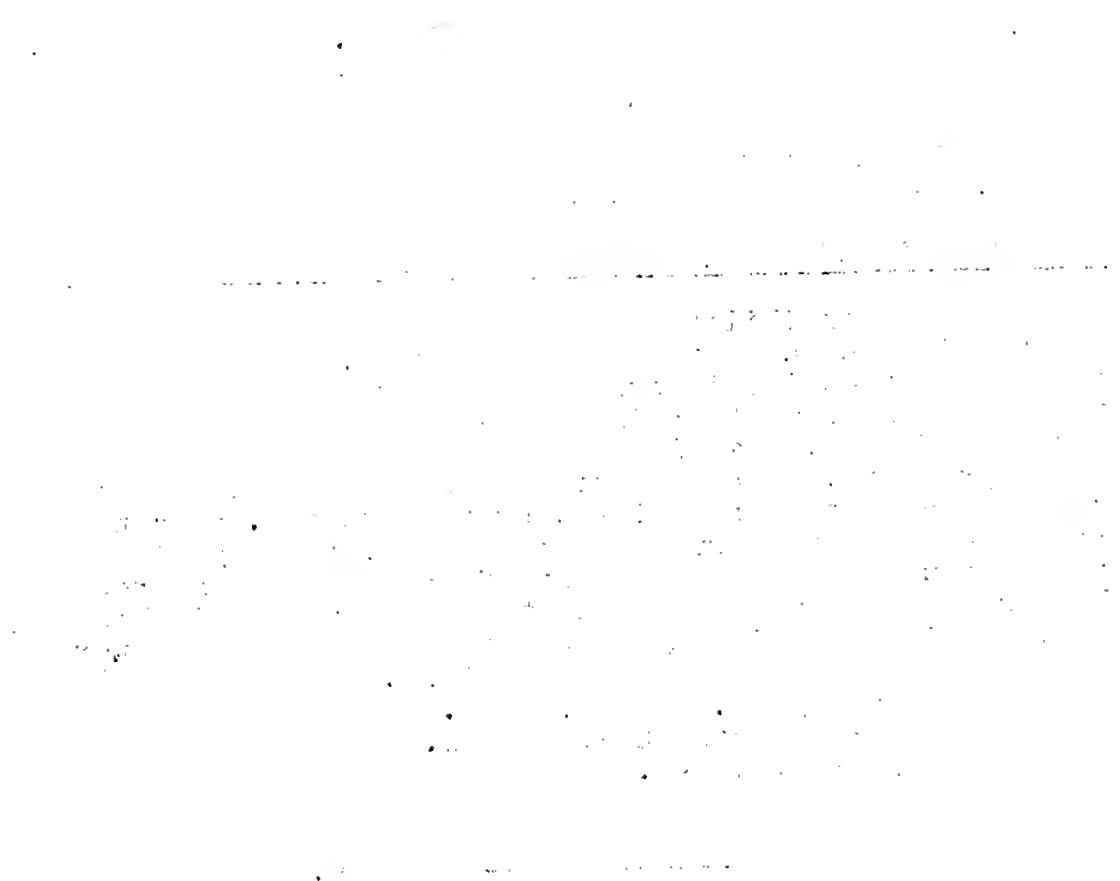
Pomeroy Eq. Vol. 2, 1060.

Perry Trusts, 259,261,401.

Bispham, 135-9.

-----0-----

Jan. 15 '03.



## LECTURE XXVII.

---0---

The office of the trustee is one of confidence. It follows from this, that the duties of the trustee can never be delegated. The trustee has no right to confer upon another the authority that has been conferred upon him because the trustee is selected because of some quality that the person making the selection thinks he possesses. If he does so and a loss occurs or the property depreciates in any way, the trustee will be personally liable and responsible therefor. But this proposition is not so comprehensive as to mean that the trustee must personally perform every duty of the trust. His authority cannot be delegated, his discretion cannot be delegated, but he may perform duties through agents that are ordinarily performed through agents. He may do anything through subordinates that is ordinarily so done in the conducting of a business like those he is conducting as trustee. It is his personal judgment and personal discretion that he cannot delegate.

## DICTATION

The duties of the trustee are personal, they cannot be delegated to another, that is to say, the personal discretion and judgment of the trustee can never be delegated. He may perform through agents, attorneys and managers such duties as are ordinarily performed by such subordinates, but he cannot properly delegate to them his judgment or discretion.

Perry Trusts, 402-410.

Seally v. Hill 49 Wis. 473.

Pomeroy Eq. 2, 1068.

In re Weall (42 Chan. Div. 674; Illus cases 496

## DICTATION

The first duty of the trustee is to take possession of the trust property, collecting debts and converting perishable property into cash.

Bispham Eq 139.

Perry Trusts 438-9.

After he gets the trust property into his possession the trustee is in a position to carry out the trust. His next duty is to carry the trust into execution. And in carrying the trust into execution, the trustee must conform to certain established rules and requirements. In the first place he should conform strictly to the requirements of the instrument by which the trust is created. When the





trustee is in doubt as to the meaning of the directions and requirements contained in the instrument creating the trust, he should and it is his duty to apply to the court for instructions and when he is in real doubt he may always do so at the expense of the trust estate. The strict following of the directions given by the court will always relieve the trustee of personal liability. In making this statement I refer not only to trustees strictly speaking, but to quasi trustees, executors, guardians, etc. This appeal to the court must be done in a somewhat formal manner. The application must be by petition and all those persons interested in the estate must be notified, then a hearing of the petition will be had and the order of the court will follow. In the absence of direction in the trust instrument, always in the case of an administrator, you must look to the statute for directions and if in doubt as to the construction of the statute you are always at liberty at the expense of the trust estate to go into court for directions.

#### DICTATION

The next duty of the trustee is to carry out the provisions of the trust and in doing this the first rule to be observed by the trustee is to conform in his action exactly to the directions of the trust instrument. If there is no trust instrument and the trustee acts by virtue of the statute, he should conform exactly to the requirements of the statute. Whenever in doubt as to his duty either under the statute or the trust instrument the trustee should apply to the court for instructions. The order of the court will always protect him from personal liability.

Pomeroy Eq. Vol. 2, 1062-4.

In carrying out the trust the trustee must use ordinary care and prudence. He should act with the same care, skill, and prudence that an ordinary man displays in the transaction of his own business and property under like circumstances. It is only ordinary care and diligence that the law requires of the trustee. If the trustee fails to exercise this ordinary care and diligence and loss results he will be held personally liable for the same. He is not required to exercise the highest degree of care, for if this were required it would be impossible to find any one to accept the trust. The amount of care and diligence that the trustee exercises in particular cases must be measured by the business he is to transact and the duty to be accomplished. He would have to exercise more care over valuable personal property that can be carried away than he would over valuable real property.



## DICTATION

In carrying out the trust the trustee must exercise ordinary care and diligence. The highest degree of care and diligence is not exacted for the reason that if it were it would be impossible to obtain men for the trust position. The ordinary care and diligence of the ordinary business man is all the law exacts of the trustee.

82 N.Y. 499.

144 Ill, 90.

Pomeroy 1066-70.

I have said that if any of the trust property consists of debts, that it is the duty of the trustee to collect these debts within a reasonable time, if he delays to do so and losses result, he will be personally liable therefor. He must follow up the collection of the debts with the diligence of an ordinary prudent collector. I do not mean to say that all demands should be collected immediately by the trustee, he must exercise considerable business judgment in this. It may be for the best interests of the estate that the collection of a debt be not pushed; if in cases of this kind he exercises ordinary business judgment, even though losses ensue he will not be personally liable. In regard to the care of trust property the trustee must exercise ordinary care and diligence. If any part of the estate consists of money at the time it came into the hands of the trustee or is subsequently turned into money by him, the question arises what shall he do with that money. It is ordinary care and prudence for him to invest that money at the earliest possible moment. But it generally takes some time before a suitable investment can be found. As a rule it is not proper for him to keep this cash in his own possession ~~which~~ while waiting for an investment. It is proper for him to deposit the money in a bank in good standing in the neighborhood or town where he resides. He must exercise ordinary business judgment in selecting the bank and if he does so and the bank fails he will not be personally liable. If he selects a bank which people generally regard as a safe and proper place for deposits, he will be protected if he deposits the money in the right way, and thus the question of how he should deposit the money arises.



A deposit by a trustee of trust funds should never be in his own name; it should never be deposited with his own funds, that is a mingling of funds that the law does not allow and a mingling of that kind makes him an insurer of the trust funds. He must deposit the money in the bank as a trust fund. It should be made in the name of the trust estate, not in the name of the trustee, for example, the estate of AB, deceased, by such a person Admx. If the deposit is made in the name of the trust estate and the bank is selected in the way I have suggested and a loss occurs, the trustee will not be liable therefor. If it is made in his own name he will be personally liable.

## DICTATION

In the protection of the trust property ordinary care and diligence must be used. If any part of the trust estate is money, that money while awaiting investment should be deposited in a bank of good standing in the neighborhood in the name of the trust estate. Under such circumstances the trustee will not be personally liable for a loss. It is improper for the trustee to make deposit in his own name or to mingle the trust funds with his own on deposit and if he does so he will be personally liable for loss.

Perry Trusts, 434.  
12 R.I. 544.

The trustee may leave money on deposit a reasonable length of time while awaiting investment. What is a reasonable time will depend upon the circumstances of each individual case. If the trustee leaves the trust funds on deposit a reasonable length of time awaiting investment and loss ensues he will not be personally liable.

What are the duties of trustees as to investments? In investing trust property, the trustee must exercise ordinary diligence and care. The duties of the trustee in investing trust funds are of somewhat delicate nature. He is to exercise such reasonable prudence in the investment of the trusts funds that the estate will be practically insured against loss and at the same time make money for the estate and make it as productive as possible. If he fails to exercise reasonable prudence in making the investment and loss results he will be held liable for the loss.

## DICTATION

It is the duty of the trustee to invest the trust funds and in doing this he must have in mind both the safety of the estate and the income therefrom. He must exercise ordinary care and diligence in protecting the estate from loss and he must also produce the largest possible income therefrom, that is, the largest income consistent with the safety of the estate.

Pomeroy, 2, 1071-1072.

Fry v. Admx. of Fry, 17 N. J. Eq., 71.



The selection of securities becomes a matter of a good deal of importance to the trustee. I will suggest to you some rules by which the trustee must be governed in the selection of securities. If the trust instrument gives directions as to what securities should be secured for the trust investment, those directions must be followed. However, if your judgment indicates to you that other investments would be better for the trust estate it is your duty to apply to the court for directions; do not take the matter in your own hands for if you do you will become an insurer against all losses. If the instrument gives to the trustee general discretion as to what shall be the best securities for the investment of trust funds, that discretion must be exercised with reasonable prudence.

#### DICTATION

##### RULES AS TO INVESTMENT.

(a) First follow any directions that may be given in the trust instrument, never depart from it unless protected by an order of the court. In the absence of directions in the instrument follow the general principles of equity in regard to trust investments.

Pomeroy 2, 1073.

Perry Trusts, 452.

As to the equitable rules upon the subject of investment, I challenge your attention to them because they are matters of prime importance in regard to trust management.

#### DICTATION

(1) Mere personal security is not regarded by the court as a proper investment for trust funds for the reason that the personal responsibility of the man is the only thing you have to depend upon and if misfortune overtakes him, there is nothing back of his promise to rely upon. The trustee should never invest in them if he desires to keep himself free from personal liability.

Simmons v. Oliver (Illus. cases 516)

(84 Wis 633)

Pomeroy Eq. 2, 1074.

-----0-----

Jan. 16 '03.





## LECTURE XXVIII

--0--

At the close of the hour I was engaged in explaining to you the rules in regard to the investment of trust funds. I think I suggested that the investment of trust funds in mere personal security is not countenanced by the court of equity. An investment in a man's note or bond unsecured would be an investment in personal security and if a loss should occur through such an investment of trust funds the trustee would be personally liable therefor. Courts of equity have always taken this ground because personal security has not the stability of real estate or government securities. I think I had suggested that notwithstanding this rule it may often be good business policy to advise a client to invest trust funds in these personal securities, but you should never take the responsibility of so doing without explaining to him that if there is a loss he will be personally liable.

## DICTATION

Investments in stocks, bonds or other securities of private corporations are not favored by the courts.  
Pomeroy Eq. 2, 1074

It is the rule at the present time in England that where specific directions are given in the trust instrument as to the investment of trust funds they should be followed, but where no directions are given in the trust instrument, that the investment should be in government securities or real estate securities. Formerly the investment of trust funds in real estate securities was not sanctioned in England, because they were not of the stability that trust funds should have in the way of investment. The trustee cannot invest in municipal bonds or bonds of foreign countries or in corporate bonds. The law of England has exerted an influence upon the law in this country in this respect although the laws in respect to investments of trust funds is not so stringent as in England. A trustee can never employ trust funds in trade or business of any kind. In this country, as a rule, trustees should not, except as authorized, invest trust funds in bonds and other securities of private corporations. In a few of the states there is an exception to the rule. In the state of Mass., it is proper, as decided in a leading case, to invest trust funds in stocks and bonds of private corporations. One case goes so far as to hold that a trustee is not liable although he has continued to keep trust funds invested in stock that is constantly declining.



## DICTATION

In England, the law as to investment is more stringent than in America. But in this country it is improper for the trustee to use trust funds in trade or in business of any kind, unless he is authorized by the trust instrument so to do, nor can he invest in the securities of private corporations.

King v. Talbot (Illus cases, 503)  
(40 N.Y. 76)

A more liberal doctrine is found in Mass.

9 Pick. 446 (Ill. cases 518)

20 Pick. 116

130 Mass. 262

In some of the states there are statutes authorizing the investment of trust funds in bonds of the cities in which the trust is to be executed. Whenever you have occasion to advise a trustee as to the investment of trust funds always turn to the statute and make yourself familiar with the statutory provisions upon the subject. Where the statute is not extensive enough to cover the case in hand the general principles of equity in regard to the investment of trust funds will govern. In the absence of express instructions in the instrument and in the absence of any special statutory provisions upon the subject, the following investments are considered proper investments for trust funds, and no where will you find a statute that says they are not good; they are good whatever the statutory provisions may be: (1) The investment of trust funds upon first mortgages upon improved land. The trustee invests trust funds in second mortgages at his peril. (2) As a rule the trustee may safely invest trust funds in government securities and securities of the state within which the trust is being executed and securities of the United States.

## DICTATION

The following are proper investments:

In first mortgages on real estate and United States securities.

Ordinarily United States securities would be regarded as proper investment, but I am inclined to think that the trustee would not be justified in putting trust funds into United States securities when he could find perfectly good real estate securities drawing a larger percent. on the investment, because it is the duty of the trustee to get as large a return as possible on the investment and at the same time protect the estate against loss.

Generally, also in the securities of the state within which the trust is to be executed.



Pom. Eq. 2, 1074  
Perry, Trusts, 458  
81 N.Y. 398  
55 Ala. 440  
83 N.Y. 613

The trustee, however, invests trust funds in second mortgages or other subsequent mortgages at his peril.

32 N.J. Eq. 524  
32 N.J. Eq. 611

And as a rule the trustee invests in foreign securities as his peril.

84 N.Y. 239

I have said that in conducting the trust business and especially in investing the trust funds, the trustee must exercise ordinary care and diligence and have also suggested that he does not exercise ordinary care and diligence when he invests trust funds in speculative securities and if he does so and a loss occurs, the loss falls upon him. It may occur to you that the rule is inconsistent because ordinary prudent business men frequently make speculative investments, and are not condemned for it, then, why is it not proper for the trustee to make speculative investments. Please remember that this rule is given with this qualification, it is the conduct of an ordinary prudent business man in regard to the handling of his own property that he desires to keep practically free from loss and at the same time to increase it to the greatest possible extent.

Now there is another rule of law that the trustee is bound by in making use of trust funds and it is this: The trustee cannot deal with trust property for his own advantage. In all matters connected with the trust, the trustee must act only for the best interests of the beneficiary. The cestui que trust can hold the trustee to an accounting of all profits and can hold him liable for all losses sustained by reason of his having used trust funds for his own interest. It is improper to invest trust property at a large rate of interest and account for ordinary rate of interest. And if the cestui que trust discovers this and a loss occurs on account of his taking risks he will be liable and will be liable if he only takes the risks that an ordinary business man would take, if the investment was for his own individual gain. In that case he is held as an insurer of the estate.

#### DICTATION

The trustee cannot deal with trust property for his own advantage. He cannot invest it in his private business; never can properly use it to make an income for himself. If he does this and profits accrue, the beneficiary



is entitled to it; if a loss occurs the trustee is liable therefor.

Pomeroy, 2, 1075

86 Mo. 475(Illus. cases, 529)

It is improper for the trustee to confuse trust property with his own. If trust property consists of money it is improper for the trustee to mingle that money with his own whether it is in a private safe or in the bank. If a loss occurs after a deposit of that kind the trustee would be personally liable therefor even though the bank at the time the deposit was made was regarded generally in the neighborhood as a sound and safe institution. The moment the trustee departs from the path of his duty, he becomes an insurer and is liable to all events. If he gets profits for mingling trust funds with his own, the beneficiary is entitled to those ~~own~~ profits and if it cannot be ascertained what the profits were, he will be allowed interest.

#### DICTATION

Trustee cannot properly confuse trust funds with his own. He cannot for example deposit them in a bank together with his own funds; if a loss follows the mingling of the trust funds with his private funds, the trustee will be personally liable therefor, even though he has exercised good business judgment. The moment he departs from his line of duty as marked out by equity or the statutes on the subject, or the trust instrument, he becomes in effect an insurer of the property. If profits have accrued from this cause the beneficiary is entitled to them. If the profits cannot be ascertained the beneficiary is entitled to interest and in some cases to compound interest.

Pom. 2, 1075 and note 2.

Perry, Trusts, 447

It is always the duty of the trustee to keep himself in such a position that there will be no temptation for him to work for his individual interests. He cannot, for example purchase his own property for the trust estate nor can he sell trust property to himself.

1

18 Beav. 75(Illus. cases, 522)

If, however, the beneficiary has been informed of the transaction of this kind and has accepted the results of it, he will not be allowed to repudiate it without returning to the trustee what he has received.

84 N.Y. 190

17 N.J. Eq. 554.





## DICTATION

Trustee cannot properly deny the title of the beneficiary; cannot assert title or interest to be in himself, although he has received it before accepting the trust. He can only set up this adverse claim after the termination of the trust relation. If he knows that he has an interest that will be desirable for him to assert he should not accept the trust.

45 Ga. 110

17 N.J. Eq. 185

Perry on Trusts, 433.

The trustee is not to seel trust property to himself. Any transaction of this kind entered into behind the back of the beneficiary is voidable and may be set aside, unless he being capable of acting in his own behalf, has assigned with full knowledge of all the facts. Frequently cases arise where the executor gets a third party to purchase trust property at a sale for the benefit of the executor and afterwards a deed passes from the third party to the executor. Transactions of that kind are improper. It is constructively fraudulent and may be set aside unless it can be shown that all the parties received due consideration, and that the trustee accepted the results of the transaction knowing all the facts and being capable of acting for himself. It is improper to purchase trust rproperty from the beneficiary and the sale may be set aside in many cases. Take the case of attorney and client; it is improper for the attorney to take conveyance of property from his client. If the client deeds to the attorney real property while the relation of attorney and client exists, a transaction of that kind is presumably fraudulent. The burden is thrown upon the attorney to show that the transaction was free and above board and that he paid a full consideration for the property or received it as compensation for his services.

-----0-----

Jan 22 '03.



## LECTURE XXIX

--0--

I was speaking at the close of the hour with respect to the trustee purchasing trust property behind the back of the beneficiary. It is not proper to purchase trust property behind the back of the cestui que trust and without his knowledge, even though the trustee does it through the instrumentality of a public sale. Very frequently trustees think that it is proper to purchase trust property by getting a third party to purchase the property at a public sale and then to reconvey the trust property to them. Transactions of that kind are constructively fraudulent and a court of equity will set the sale aside at the suit of the beneficiary, unless he has acquiesced in the transaction by receiving the profits thereof, knowing all the facts connected therewith, and being legally capable of acquiescing in a transaction of that kind. But equity goes even further than this, it is not proper for the trustee to purchase property from the cestui que trust. Transactions of that kind are presumably fraudulent and they can be set aside at the suit of the beneficiary. The transaction throws the burden upon the trustee to show that everything connected therewith was carried on in a manner above criticism or reproach. It throws the burden upon him to show that full consideration was paid for the property. These remarks apply to trustees proper, and also apply to various relations that are not technically the relation of trustee and cestui que trust; they apply to the relation of attorney and client, guardian and ward, executors, administrators, partners, principal and agent, etc.

## DICTATION

It is improper for the trustee to purchase trust property behind the back of the beneficiary and such a purchase is presumptively invalid, even though it be made at a public sale of the trust property and through the intervention of a third party. Even a purchase directly from the beneficiary by the trustee is looked upon with marked disfavor by courts of equity, and will be set aside unless the trustee can overcome the presumption that arises against the transaction by showing that it was in every respect a proper transaction.

175 Pa. St.; 92 (Illus. cases 527)

Pomeroy 3, 958, 959-960

2 Johnson Chan. 252

27 N.J. Equity 162

Berry on Trust 200.



## DICTATION

In order that the trustee may shield himself from irregular conduct behind the claim of acquiescence on the part of the cestui que trust, the acquiescence must be characterised as follows:--

(1) There must be legal capacity on the part of the beneficiary.

(2) Must not be the result of undue influence or restraint.

(3) With full knowledge by the beneficiary of the whole transaction or means of knowledge at any rate.

(4) Full knowledge by the beneficiary of his legal rights.

Pomeroy 2, 964-5, 1083

Perry on Trusts 467-849.

Another duty of the trustee is to keep distinct and accurate account of all his doings. He must not mingle trust accounts with his own. The accounts of the trustee should always be open to the inspection of the beneficiary at proper times and under proper conditions. The beneficiary is always entitled to see what the beneficiary is doing and if the trustee refuses to allow him to inspect the accounts he may get an order of the court compelling him to do so. There should be a separate account of all trust expenses; if the trustee mixes up trust expenses with other accounts, it is likely to lead to a great deal of confusion and trouble for the presumption is against the trustee when it appears that he has not kept any distinct account of expenses.

## DICTATION

Trustee should always keep a full and accurate account of all his doings. It is better that he should keep an account of his expenses separate and distinct from his other accounts. Under no circumstances should his accounts as trustee be mingled with his personal accounts. If this is done a presumption arises against the trustee that is difficult to overcome. Further the trust account must be open to the inspection of the beneficiary, if inspection is refused, the court can compel it.

Pomeroy 2, 1063

36 Me. 577

54 Pa 60

Upon the termination of the trust, accounts must be settled and the property turned over to the beneficiary and if the trustee neglects to do this he may be compelled to do it. Settlement may be immediately with the beneficiary without the intervention of the court, if the beneficiary is not laboring under a disability. If he is laboring under



a disability, settlement should always be made through the intervention of the court.

26 Mich 435

Perry on Trusts, chap., 32

Pomeroy 2, 1065

In case of a breach of the trust, the beneficiary has the election either to follow the trust property itself or proceed personally against the trustee. Of course if the trustee is insolvent and the trust property is capable of identification, the beneficiary would pursue the property rather than proceed personally against the trustee. Of course it may be, and there usually is, a third opportunity, namely, the opportunity that is given the beneficiary to proceed against the sureties on the bond of the trustee for the proper performance of his duties. Almost always the trustee is compelled to give a bond for the performance of his duty. Quasi public trustees are required by law to give bond. It has been held that administrators must give bond even though it is waived in the will.

#### DICTATION

In case of breach of the trust the beneficiary may either follow the trust property or proceeds against the trustee personally or proceed against the trustee and the sureties on the bond that has been given to secure the proper performance of his duties.

Perry on Trusts, 843

Pomeroy, 2, 1080

31 Calif. 17

40 Miss, 599

Now where an action is brought against the trustee personally he cannot as a rule shield himself behind the Statute of Limitations. As a rule the Statute of limitations does not apply to trustees for the reason that the trustee is in a position to conceal the right of action from the beneficiary. As a rule in the statutes of the different states you will find special exceptions in regard to trustees, but in the absence of special exceptions, these statutes are not held to apply to trustees. There are some exceptions to the rule, however; if it appears that there is a fund in the hands of the trustee which by the terms of the trust, the beneficiary is entitled to, and if appears that it is a sum for which the beneficiary can bring suit in a court of law and get judgment for the amount, then the Statute of Limitations will run; for example, if the trustee has collected a certain amount of money which under the provisions of the trust, it is his duty to collect and pay over to the beneficiary, the beneficiary knowing he has made the collection, and has the money in his hands, then the beneficiary may go into a court of law and sue the trustee for the amount. As a rule all matters between





trustee and cestui que trust must be settled in a court of equity, but this is one of the exceptions. Wherever this state of facts exists and the beneficiary instead of bringing suit, allows the thing to drift along, the trustee may plead the Statute of Limitations.

Perry on Trusts, 863

A court of equity not only has authority to appoint a trustee, but also has the authority to remove a trustee and is the only court that has authority to do so. This is a matter in which the court of equity will not act excepting upon the clearest possible evidence. The simple fact that the trustee is not doing what the beneficiary thinks he ought to do will not be a ground for removing him. It is a rather serious thing to remove a trustee, for he is selected for his personal integrity and personal ability by the person creating the trust, and for the court to step in and remove him without full and complete evidence of his incapacity or irregularity on his part would be a serious thing to do. Insolvency of the trustee after he has undertaken the trust, so that he is not personally responsible would be a reason for removing him. Or if the trustee has removed from the jurisdiction of the court that would be a ground for removing him and placing another in his place. The court has not only the power to remove, but also the power to appoint another trustee, and pending the appointment, the title to trust property vests in the court.

#### DICTATION

Equity has power and authority not only to appoint but also to remove a trustee upon the proper evidence of his incapacity or irregularity being shown.

Perry on Trusts 275-9, 817-8

Pomeroy 2, 1087

First Chan Div., 43(Illus cases, 546)

Before leaving this subject I must say a word or two as to the compensation that trustees are entitled to. As I have already suggested the trustee cannot make any personal profits out of the trust relationship over and above the compensation which the law allows him, and in some jurisdictions he must be satisfied with the honor without any compensation, because under the old English rule and under the rule that prevails quite generally in this country, the trustee is entitled to no compensation and is entitled only to be reimbursed for his expenses he has paid for the trust estate. That is the old English rule, unless the trust instrument provides for compensation. But in most of the states at the present time the trustee is entitled to something more than the empty honor of holding the trust. First, if compensation is provided for in the instrument, that will govern, unless extraordinary duties are imposed upon the trustee that were not contemplated by the party at the time he made the trust instrument, then additional compensation will be given by the court.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

## DICTATION

In some of the states you will find statutes that provide expressly for compensation of the trustee. In most of the states you will not find any such statute, but you will find in all the states statutes regulating the compensation of administrators and executors, and it has been very generally held that statutes of that kind altho they do not expressly refer to trustees pure and simple, will apply to the ordinary trustee. We have a holding of that kind in the state of Mich, Ill and N.Y.

Trustees in this country are now entitled to compensation; amount governed by provisions in the trust instrument or by statute. If extraordinary services are rendered, this amount (the amount fixed by statute or by the instrument) may be increased by the court.

Perry, 916-919

Pomeroy, 2, 1084-5.

Prepare these two cases carefully:--

132 Ill, 139; 24 N.E. 524 (Illus cases 534)

55 N.Y. 2639 Illus. cases 535)

---oOo---

Jan. 23rd., 1903.



--:INDEX:--

Pages

A cumulations, Statute against,	104
American Statutes,	73
Assembly of the Wise,	3
Attitude of courts in regard to trust arising from use of precatory word,	84
Anglo Saxon Period,	3
Antagonism between trustee and beneficiary,	105
Authority of Chancellor,	11- 16
Bargain and Sale,	66
Bibliography,	1
Cestui que trust,	87
Chattels real,	74
Charles II	70
Charitable Uses or Trusts,	85- 96
Characteristics of Trust legislation,	97
Circuit Court Commissioner,	20
Court of Exchequer,	5
Corporations, charities effected thereby,	105
Constructive Trusts,	106
Classes of,	110-112-113-114-115- 113
Commercial paper deposited with bank for collection,	118
Covenant to stand seized,	67
Compensatory damages,	34
Cancellation,	28
Common Law Judges,	9
Complaint, bill of,	11
Creditors, to sell land for benefit of,	97
Cy Pres Doctrine,	96
Kinds of, Judicial and prerogative,	96 99
Decentralization,	3
Depository of legal title, passive trustee,	86
Defects of Common Law Courts,	8- 9
Decree in Equity,	54
Definition of Maxim,	23
Distinctions between implied and express trusts,	105
Differences between law and equity courts as they exist to-day,	20
Donee, of power,	90
Duties of donee,	91
Edward III	8
Effect of Statute of Uses,	65
Elizabeth,	101
English rule as to investment of trust funds,	131
English Statute,	73



English System of Equity to-day,	17
Equity acts specifically and not by way of compensation	56
Equity acts in personam, and not in rem,	54
Equity imputes and intent to fulfill and obligation	53
Equity of Redemption,	52
Equity regards that as done which ought to be done,	49
Equity looks to the intent rather than to the form,	50
Equality is equity,	46
Equity aids the vigilant, and not those who slumber on their rights,	44
Equity follows the law,	35
Equity will not by reason of a merely technical defect permit a wrong to be without a remedy,	30
Exception,	31
Equitable remedies,	25
Equitable rights,	25
Equitable title,	24
Equity, system in United States,	19
Essentials of writing creating a trust,	71
Express passive trusts, prohibited by statute	86
Express passive trusts,	85
Express active trusts,	85
Express trusts,	68
Ex delicto, trusts,	122
Fraud, basis of constructive trust,	111
Freehold interest,	64
General Outline of Equity,	23
He who seeks equity must do equity,	40
He who comes into equity, must come with clean hands,	42
Henry VIII	16
Implied trusts,	69
Implication of law,	74
Intention of parties,	69
Investment of trust property,	128
Intention basis of resulting trust,	110
Interest, cannot be assigned,	98
Injunction,	25
Kinds of,	
(A) Mandatory,	26
(b) Prohibitory,	46
Judicature Act, 1873,	6





	pages
Judicature Act,	17
Jurisdiction of Equity,	12
King's Court,	5
Laches,	34
Legislation in regard to trusts,	92
Lease and Release,	67
Local courts,	3
Maxims of Equity,	23
Maxims of Equity	30
Master in Chancery,	20
Maine Statute,	73
Manifested and proved,	71
Mere personal security not proper security for in- vestment of trust funds,	129
Mich Statute,	91-92
Mortgage, in equity,	52
Nature of Equity,	22
Nex excoat,	29
New York Statute in regard to Charitable uses,	104
No jury in Equity,	20
Original Writs,	9
Parol evidence,	74
Parol, trust created by,	70
Passive Uses,	65
Performance of duties,	14
Perpetuity, Statute against,	100
Personal duty of trustee,	125
Personalty, Statute of Frauds does not apply,	74
Powers, duties and liabilities of trustees,	123
Private trusts,	85
Powers coupled with a trust,	90
Naked powers,	88
Powers in trust,	86
Purposes, for which trusts may be created,	67
Public Trusts,	85
Precatory words, use of,	84
Proper investment of trust funds,	131
Procedure in equity courts,	9
Precedents,	8



## EQUITY JURISPRUDENCE, JR.

	pages
Real property,	74
Receiver impressed with trust,	118
Receivership,	29
Recission,	28
Reformation,	24
Rents and profits,	97
Respondent,	11
Resulting Trusts,	106
Classes of,	107, 110
Roman Law, source of equity,	7
Rules in regard to the investment of trust funds,	129
Source of Equity,	7
Statute of Uses,	15-63 ----- 96
When applies,	64
Statute of Charitable Uses,	101
Construction of,	103
Superior Court,	6
Statute of Frauds,	70
Testimony, how taken in a court of equity,	20
Trust, void under statute,	97
Tracing trust funds,	120
Trust, kinds of,	59
Trust inferred by construction of the instrument,	81
Circumstances under which they may arise,	82, 83 84
Trust relations not classified,	122
Title of beneficiary, trustee cannot deny,	134
Uses and purposes deemed to be charitable,	104
(1) For relief of poor and needy,	104
(2) Educational purposes,	104
(3) Public purposes,	104
(4) Religious purposes,	104
Vendor's lien,	25
Voluntary trusts,	76
Writing sufficient to create a trust,	81
Where there are equal rights or equities the first in order of time must prevail,	37
Where there is equal equities the law must prevail,	40



L E C T U R E S

O N

E Q U I T Y J U R I S P R U D E N C E, S R.

B Y

D E A N H A R R Y B. H U T C H I N S

-----

Reported by C. G. McCollom

-----

U N I V E R S I T Y O F M I C H I G A N

Law Class of 1904.

-----

Edwards Bros.-----Publishers,

Ann Arbor, Mich.

1903-1904.



## CHAPTER I.

---oOo---

This semester we will have to do with that portion of Equity Jurisprudence known as Equitable Rights or Grounds for Relief in Equity and later on with Equitable Remedies consisting of the various remedies that a court of equity uses to enforce its principles. The subject that I wish to take up first is this subject of Equitable rights or grounds of relief in Equity. An equitable right is a right to some one of the equitable remedies. This right may be exercised with regard to a property interest or with regard to the personal status; it may be exercised with regard to contract rights. In discussing this subject of equitable rights or grounds of relief in equity, I shall not discuss all the equitable rights that you shall meet with in practice, but I shall call your attention to the principal ones and the first one that I wish to discuss is known as ACCIDENT. It is one of the oldest of Equity Jurisdiction heads. If you will look into the old books you will find, that at the very beginning of the enforcement of equitable rights, relief was granted in a great number of cases on the ground of accident. Indeed, you will find that the relief granted in equity on the ground of accident was much broader than it is to-day. To-day the jurisdiction of the lawcourts over matters of accident has been very much extended, and perhaps it is the exception when we apply to the equity courts for relief on the ground of accident. Notwithstanding this extension of the jurisdiction of the law courts, the equity jurisdiction remains in all of the original cases and is exercised frequently.

It is difficult to define the term 'accident' in a way to include all the essential elements and to exclude all the elements that are not essential. Justice Story defines accident in such a way as to convey its popular and not its technical meaning. The following definition will be found to be reasonably accurate and comprehensive: Accident is an unforeseen and injurious occurrence that is external to the party effected by it and is not the result of the negligence or misconduct of that party, by which rights are lost or liabilities incurred that would be contrary to equity and good conscience not to remedy. That is substantially the definition given by Pomeroy. An accident is something that is thrust upon a party without his own volition or negligence in any particular. A party may through his own carelessness suffer a loss, as for instance he may lose a promissory note and his neighbor may say that is a very unfortunate accident, but it is not an accident as equity uses the term. It must be something beyond the power of the party affected. It may be brought about through some natural causes or through some of the convulsions of nature or through the shortcomings of some one by whom the party who suffers is surrounded.





In the case of *Kopper v. Dyer*, 59 Vt. 477, the court said: "The term 'accident' in its legal signification, is difficult to define. Judge Story defines it as embracing, 'not merely inevitable casualty, or the act of Providence, or what is technically called vis major, or irresistible force, but such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct in the party' affected thereby. 1 Story, Eq. Jur. par. 78. Mr. Pomeroy justly criticizes this definition as including what are not accidents at all, but mistakes, and as omitting the very central element of the equitable conception, and defines it thus: "'Accident' is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain." 2 Pom. Eq. Jur. 823. And the chief point of the thing is that, because of the unforeseen and unexpected character of the occurrence by which the legal relation of the parties has been unintentionally changed, the party injuriously affected thereby is, in good conscience, entitled to relief that will restore those relations to their original character, and place him in his former position."

### DICTATION

#### EQUITABLE RIGHTS OR GROUNDS FOR RELIEF IN EQUITY.

'Accident' is one of the oldest heads of equity jurisdiction. The earlier jurisdiction in case of accident was much broader in fact than the jurisdiction at the present time. In theory the jurisdiction has not changed essentially.

DEFINITION: Accident is an unforeseen and injurious occurrence that is external to the party affected by it and is not the result of the negligence or misconduct of that party, by which rights are lost or liabilities incurred that would be contrary to equity not to remedy.

Pomeroy Eq. Jur. Vol. 2, par. 823.

*Kopper v. Dyer*, 59 Vt. 477; 9 Atl. Rep.

(Illus Cases 159)

I wish you to be prepared upon the last case.

It is not every case of accident that will be remedied in a court of equity. The jurisdiction of the court of equity is limited and defined in case of accident. In order that jurisdiction may attach the party seeking relief must have a conscientious right to relief. You must first have what is known as a conscientious right to relief, - a right which appeals to the conscience of the court; secondly, you must have a case which cannot be adequately remedied in a court of law. In some cases of accident the common



law courts can and always have afforded adequate relief. When it is said that equity will not grant relief in case of accident where there is an adequate remedy at law, this statement must be taken as meaning the relief granted by the courts of law at the time of the origin of equity jurisdiction. At the time of the origin of equity jurisdiction there certain legal remedies in case of accident. If the case falls within any one of those you cannot have relief in equity on the ground of accident because there is a complete remedy at law.

#### DICTATION.

In order that a party may have relief upon the ground of accident it must appear: (1) that he has a conscientious right, in other words, that he has so suffered through accident that a court of equity ought to furnish relief; and, (2) he must have suffered in such a way that he cannot find relief in a court of law. When, however, it is said that relief in equity will never be granted where there is an adequate remedy at law, the remedies at law to which reference is made, are the remedies that were furnished by the common law courts at the time of the origin of equity jurisdiction. The extension of the jurisdiction of the law courts does not take away the equity jurisdiction, unless it is done by statute and in the statute it is expressly declared to that effect.

Pom. Eq. Jur. par. 182-3-276-281., inclusive.

10 E. & R. (ky) 40.

I will give you a few instances in which equity will not interfere on the ground of equity. If a party has suffered an accidental loss as the result of his own negligence, the occurrence is not an accident as understood and defined in equity. Equity, will not, as a general rule, relieve a person from a duty which he has contracted to do, but which he finds impossible or extremely burdensome to perform. For instance a party contracts to erect a block of buildings within a certain period. When almost completed the building is destroyed and he is unable to keep his contract. He would have no standing in a court of equity. He should have stipulated against contingencies of this kind in his contract.

Suppose a person has leased a building and in the lease he has agreed to deliver up the building at the end of the term in the same condition that he received it, reasonable wear and tear excepted. The building is destroyed by fire. Equity will not relieve him for he should have made a broader exception in the lease. (reasonable wear and damage from the elements excepted.)

#### DICTATION

A court of equity will never grant relief on the ground of accident where the loss or liability is the result of negligence



of the party seeking relief.

15 Ver. 757-762-3.

4 John. Chanc. 566

6 Iradell( N.C.) 418

3 John. 44

6 Mass. 63

30 Md. 301(Illus Cases 166)

70 Me. 288(Illus Cases 652)

Prepare the last two cases for a Quiz.

#### DICTATION

An equity court will not interfere to compel the execution of a discretionary power which through accident has not been exercised and this for the reason that the party seeking relief has not substantial interest in the property, he has simply a hope or expectancy which has been defeated.

-----oOo-----

Oct. 7, 1903.



## LECTURE II.

---oOo---

I will refer briefly to two or three more prominent cases in which equity will interfere on the ground of accident. In these cases there are certain departures that require explanation. In case of the accidental loss of a sealed instrument equity will, in the absence of negligence, interfere and order a reexecution of the instrument upon satisfactory proof of the loss of the instrument. This action was taken by the equity courts because at common law suit could not be brought on a sealed instrument unless proof could be made, and equity did not require proof. The equity court also had authority to require from the plaintiff an indemnity for the protection of the defendant in case the instrument should ever come to light. If you will look through the statutes at the present time you will find that the statutes provided in case of loss of a sealed instrument that a party may proceed at law and provides for an indemnity bond. So at the present time it is more usual to proceed at law and take advantage of the provision of the statute that permits the court to order a bond of indemnity, than to proceed on the equity side of the court. But as I have before explained in connection with the other cases, this departure of the common law courts has in no way affected the jurisdiction of the equity court.

## DICTATION

In a general way it may be said that equity will interfere on the ground of accident wherever a party has suffered a loss, either as to his property or as to his rights, by the happening of some external circumstance that has been thrust upon him without negligence on his part.

A few specific cases.

Equity has jurisdiction in case of accidental loss of bonds or other sealed instruments. Upon a proper showing the court will order the reexecution of the instrument or give some other decree that will do justice as between the parties. The reason for the jurisdiction is found in the facts:

(1) That proof of an instrument was never necessary in equity as at law;

(2) Because a court of equity may always order indemnity as a protection to the defendant against subsequent litigation. This a court of law could not do, but proof at law has now been done away with and by statute usually the law court may order indemnity to be given, but this extension of the common law jurisdiction does not take away the equity jurisdiction, and it exists to-day





and is concurrent with the law jurisdiction.

#### DICTATION

A second case in which equity will interfere on the

ground of accident is where a negotiable note, bill or check is lost before maturity. The reason for the jurisdiction is found in the power of the courts of equity to indemnify the defendant against subsequent suits upon the instrument--a power that the law courts did not formerly have. Authority to indemnify has been conferred by statute in many of the state upon the law courts, but this fact does not take away the equity jurisdiction.

9 Ex. 604

1 Veassv Gr. 341

101 Mass. 370

If the loss takes place after the instrument is due, probably according to the weight of authority, equity does not have jurisdiction.

#### DICTATION

According to the weight of authority, probably, equity does not have jurisdiction where the lost instrument is non-negotiable or where the loss occurs after the instrument is due, for the reason that the defendant would always have complete protection in a law court.

Bispham. para, 177.

A contrary opinion, however, prevails in some states. By some courts, the jurisdiction of equity even in this case is maintained, upon the theory that the defendant will be put to some expense in case of litigation and that he should be protected in all such cases by an indemnity bond.

53 Ga. 36

27 N.J. Eq. 408

Equity will never interfere on the ground of accident where there is a defective execution or non-execution of a mere power through accident. But where the power is a power in trust or a power coupled with a trust the situation is different and a court of equity will always interfere to complete the execution of an imperative power in favor of the beneficiary. Here a duty rests upon the donee of the power to execute the power in favor of the beneficiary and if he is prevented from so doing on the ground of accident it is only justice that a court of equity should interfere. A court of equity will interfere where an imperative power has been defectively executed through accident because the donee has a property right in the power.



LECTURE

Equity will never interfere on the ground of accident to compel the execution of a voluntary power, but on the other hand, the court will always interfere to compel the execution of an imperative power, the reason being that in the latter case the beneficiary under the power has a property interest that the court is bound to respect.

Pomeroy Vol. 2, para. 589-90.

Bispham. Para, 182.

There is another case where a court of equity will sometimes interfere on the ground of accident, although like the cases I have already discussed the interference of the court is less frequent than it formerly was. A person in an action at law may, through accident, be prevented from putting in a perfectly legitimate defense that would control the result of the litigation, and judgment being passed against him he may apply to a court of equity for an order restraining the execution of the judgment or for a new trial. Formerly this was very frequently done. But the leniency which is used at the present time in allowing defeated litigants to move for a new trial has done away in a large measure with this particular branch of equity jurisdiction.

LECTURE

Court of Equity may on the ground of accident that has prevented a party from putting in a defense at law restrain the proceedings to enforce the judgment at law or set it aside so that a new trial may be had. This jurisdiction is, however, not often resorted to at the present time; the opportunities for a new trial through motion being ordinarily sufficient.

There are several other cases of accident in addition to those I have mentioned. For such cases see:

Pomeroy Para 183

Bispham, Vol. 2, par. 637 and notes.

It is sufficient for me to suggest, in addition to what I have said upon the subject, that in any case of accident, as the term is used in equity, where the party injured has not been in default and the opposite party has no special equity to protect him, the court of equity will give relief suited to the case in hand. The jurisdiction of equity at the present time however, although it exists, is much less frequently exercised than formerly, on account of statutes that have conferred jurisdiction upon the law courts.

MISTAKE

I come now to the next ground of relief,---mistake. Mistake



has always played an important part in Equity Jurisprudence, but as in the case of accident, courts of equity are called upon less frequently than formerly to remedy mistake, for the reason that the common law courts have assumed jurisdiction in a good many cases where formerly they had no jurisdiction. The extension of the jurisdiction of the common law courts has come about almost entirely by a voluntary extension of the jurisdiction by the courts themselves, and not by any particular statutory changes.

In defining ~~mistake~~ accident I tried to impress upon you that it is an unexpected occurrence external to the party affected by it--in other words that it does not originate with the party, but is thrust upon him. Mistake is just the opposite from accident. MISTAKE IS INTERNAL; it originates with the party affected by it; it is the result of ignorance, misunderstanding, misapprehension. Mr. Pomeroy defines mistake substantially as follows: "Mistake, as understood in equity as an occasion for equitable relief, is an erroneous conclusion, induced by ignorance, misapprehension or misunderstanding of the truth, which results in some act or omission done or suffered by one or both of the parties to the transaction, without its erroneous character being intended or known at the time."

#### DICTATION

##### MISTAKE DISTINGUISHED FROM ACCIDENT.

Accident, as the term is used in equity, is thrust upon the party affected by it. Accident is external; mistake internal, so to speak. Accident is thrust upon a party; mistake originates with the party through his ignorance, misapprehension or misunderstanding. Negligence, however, cannot characterize mistake in equity any more than it can accident.

DEFINITION: Mistake is an erroneous conclusion, induced by ignorance, misapprehension or misunderstanding of the truth, but without the presence of negligence, which results in some act or omission, which it would be against equity and good conscience not to relieve.

Pomeroy, II, para. 839.

Vispah, para. 185.

All possible mistakes may be divided into:

- (1) MISTAKES IN MATTERS OF LAW;
- (2) MISTAKES IN MATTERS OF FACT.

I will consider the subject in the order mentioned.

1. 100  
2. 100  
3. 100  
4. 100  
5. 100  
6. 100  
7. 100  
8. 100  
9. 100  
10. 100

## LECTURE III.

-----oOo-----

In examining the books upon this subject of mistake, you will find that the authors are somewhat confused upon the definition of mistake, defining it as the result of ignorance, misapprehension or misunderstanding. Pomeroy says that mistake is something that flows from ignorance by which a party has suffered a loss of rights which it would not be equitable to allow him to continue to suffer. He misses the point there. The ignorance or misconception is the mistake.

It is a well known maxim that ignorance of the law is no excuse to any person either for the breach or omission of duty. As a general rule, this maxim may be said to exist in equity as in law. It is the general rule that a mistake of law cannot be urged as an excuse for an act or for the failure to meet obligations. But while the general doctrine that mistake of law is no ground for relief prevails in equity as in law, its operation in equity is not universal. As a matter of fact, equity does sometimes exercise jurisdiction on account of mistakes of law pure and simple. In order to understand the situation we must have a clear understanding of what is included within the general term MISTAKES OF LAW.

A mistake of law may be an error in regard to some part of the general law--the law that governs our public relations, the law that governs our personal conduct, the law that governs the status or citizenship of a person, the law that governs the distribution and devolution of property, the law that applies generally to all persons. On the other hand, a mistake of law may be an error of the party in regard to his rights and interests connected with the particular transaction. Such a party may be in error as to his existing legal rights and interests that are to be affected by the transaction, though he comprehends what will be the effect of the transaction upon his supposed rights. A mistake of law may be confined to one party to a transaction or it may extend to all parties. A MISTAKE AS TO THE GENERAL LAW is without remedy either in law or equity. The question now remains how far does the maxim apply to mistake as to individual rights.

## DICTATION

The general rule is that ignorance of the law is no excuse. As a general rule equity will not interfere to relieve a party on the ground of mistake at law. We may have (1) MISTAKE AS TO THE GENERAL LAW; this will never be relieved: (2) MISTAKE AS TO THE LAW COVERING A PARTICULAR TRANSACTION. The general rule is that equity will not relieve in such a case.

As to a mistake concerning individual rights, the general rule is that the party cannot have relief against a mistake of law pure and simple regarding his individual legal rights; but in order that this





rule may only the mistake must be one of law pure and simple. It must not be induced or accompanied by other special circumstances that would give rise to an equity in behalf of the party who has committed the mistake, such as want of knowledge of all the material facts, or inequitable conduct on the part of the other party to the transaction. But this is the general rule, and we shall find that sometimes in case of a mistake of law pure and simple, equity may give relief.

In the 8 of Wheaton 174, which is probably the leading American case on the subject, a creditor took from his debtor a power of attorney to execute the sale of a ship. In taking this power of attorney he supposed he was getting a security as valid as a mortgage. Subsequently the debtor died and of course the power of attorney was revoked by his death. It was held that the mistake of the party as to the effect of the instrument was no ground for relief. The case went to the Supreme Court twice and one of the opinions was given by C.J. Marshall and the other by Justice Washington. The case is valuable not only on this subject, but also on the subject of agency.

A mistake may be as to (1) the legal import of a transaction, as to its significance in the law; or (2) a mistake in reducing the transaction to writing. He may use terms that have a legal meaning, different from the one intended.

#### DISTINCTION.

A mistake as to the legal import of a transaction or as to the legal meaning, scope and effect of a writing that expresses a transaction as it was understood and designed by the parties that it should be expressed cannot be relieved in equity. Courts of equity take this position (1) because it is necessary in order that there may be certainty and security in regard to legal rights; (2) because they would otherwise be making a contract for the parties-- carrying out an intention that the parties did not have at the time they entered into the transaction.

A court of equity will reform a contract in order to make it conform to the intentions of the parties, but a court of equity will not make a contract for the parties.

It is well settled that the parties are bound by the legal consequences of their deliberate agreements and acts, in the absence of fraud, concealment, misrepresentation, undue influence or other inequitable conduct on the part of the other party to the transaction.

8 Wheaton 174; 1 Pet. 1 (Illus. Cases 170)

Prepare this case for Quiz.

3 N.J. Eq. 148

42 Iowa 107

45 Iowa 358

18 N.J. Eq. 368-74.

5 Mich. 100.

Comeroy Eq. II, par. 843.

The question of mistake may be raised either affirmatively upon a bill filed for reformation or cancellation, or negatively by way of defense.



We come now to a consideration of the second of the two different kinds of mistakes of law, namely:

(2) MISTAKES OF LAW IN REDUCING AN AGREEMENT TO WRITING.

Where an instrument is drawn and executed which is intended to embody an agreement previously entered into, but which through a mistake as to the legal meaning and operation of the terms used in the writing fails to express such an agreement, equity will interfere to the same extent as if the failure of the writing to express the real contract had been caused by a mistake of fact.

DICTION

In case there has been a mistake in reducing an agreement to writing equity will grant relief, for by so doing equity reestablishes the original contract between the parties.

64 Conn. 38

29 Atl. Rep. 133 (Illus. Cases 327)

12 N.J. Eq. 165 (Illus. Cases 186)

55 Iowa 484

8 N.W. 33 (Illus. Cases 184).

141 U.S. 260.

Be prepared on these cases.

A party may be mistaken as to his antecedent and existing legal rights, interests or liabilities, while he understands fully what will be the legal effect of a transaction upon his supposed rights, interests, duties or liabilities. Thus a person may erroneously suppose that he has a life interest only in a certain parcel of

land while in fact he is the owner of the land in fee. He gives a release of his interest in the land, knowing that the legal operation of the conveyance is to release all the interest which he has, but he is mistaken as to the extent of that interest. Is this a mistake of law or fact, and is there any relief in equity for a party so situated?

In cases of this kind courts of equity follow the demands of justice and aid the party who has suffered whenever it is possible to do so. Whenever the transaction has been induced by inequitable conduct on the part of the other party to the transaction, such conduct is seized upon by the courts as the basis of their action; but where there is an entire absence of fraud or unfair dealing, and we have simply the mistake of the party as to his antecedent and existing rights, how will the court of equity act? I think that the following conclusion will be justified by the authorities: Whenever a person is mistaken as to his previous and existing private legal rights or liabilities, either as to property or concerning contract relations or his personal status, and being so mistaken enters into a transaction the legal scope of which he fully understands, with the view of affecting such supposed legal interests, equity will regard the mistake and deal with it as a mistake of fact and grant relief either affirmatively or negatively according



to the way the matter is presented.

The general attitude of the courts is always in favor of granting relief under the circumstances suggested,--the equity of the situation appeals to the court and the court will relieve the situation if possible. Some of the courts speak of the mistake as one of fact, others, as a mistake of law analogous to a mistake of fact. That is what Tomeroy sees to think it is. Other courts say it is a mistake of law pure and simple, but it is a mistake that equity ought to relieve.

#### PICTIOL

Whenever a person is mistaken as to his previous and existing rights and liabilities or his personal status and, being so mistaken, enters into a transaction the legal scope of which he correctly understands, with a view of affecting his supposed rights or liabilities, equity will interpose and will deal with the mistake as one of fact.

Law Reps. 2 N. of W. 149

91 Mich. 1( Illus. Cases 205)

Prepare the last case for Quiz.

98 Iowa 324( Illus Cases 201)

39 Minn. 464( Illus. Cases 209)

Tomeroy, II, par. 649.

----oOo---

Oct. 13, 1903.



## LECTURE IV.

---oOo---

There are one or two exceptions to the general principle last stated in the previous lecture. (1) Where money is paid under mistake of law as to liability to make payment the party so paying cannot recover the money back either in law or equity. For a good many years this has been doctrine at law, but it seems that if I pay out money, misunderstanding my present or antecedent rights, that equity ought to grant relief. But the equity courts hold without exception that relief will not be granted under such circumstances and they do not tell you why they refuse it. Probably their reason for refusing relief is because they are impressed with the importance of following legal decisions and legal precedents that are well established and have long been acted upon. Pomeroy and Story suggest that this is the reason. Of course money paid under mistake of fact can be recovered back both in law and in equity.

In England there is an exception to this doctrine. Where money has been paid under mistake of law to an officer of the court or to a trustee acting under the direction of the court in a pending proceeding it can be recovered in an equity action.

## DICTATION

It is well settled that money paid under mistake of law as to liability to make payment, but with full knowledge of all the facts, cannot be recovered back either in equity or at law.

Pomeroy, Vol. II. par. 851  
40 N.W. 587; 39 Minn. 461(209)

There is an exception to this doctrine in England where money has been paid by mistake of law to an officer of the court or to a trustee acting under the direction of the court.

Law Reports, 9 Chan. App. 609  
Law Rep. 32 Chan. Div. 597

The reason for this exception in England is that the money has not passed beyond the control of the court and it would be inequitable to permit it to be misappropriated. My impression is that this would be the law in this country when the question is directly raised.

There is another exception to the general rule that equity will grant relief on the ground of mistake of law where a person is mistaken as to his present or antecedent rights and proceeds upon this mistaken notion. The exception to which I refer is in the matter of compromises. It is elementary





that compromises are highly favored by courts of equity. Equity courts are said to abhor litigation and to favor anything that lessens it. In the absence of inequitable conduct in bringing the compromise about, the court of equity will not interfere for any ordinary mistake either of law or fact. In a compromise a party will not be relieved even though he pays money through a mistake as to his legal rights. The very essence or object of a compromise is to avoid litigation and to settle a suit without controversy. A compromise is a surrender of certain rights by the parties and a party after he has entered into a compromise will not be allowed to claim that his rights were more valuable than he supposed at the time he made the compromise and that he should be relieved in equity on the ground of mistake.

In order that a party may be estopped from attacking a compromise there must be an entire absence of fraud, misrepresentation, concealment or other inequitable conduct at the time of the making of the compromise by the parties. If there has been any inequitable conduct the compromise may be set aside on the ground of fraud. There must have been at the time of the making of the compromise an entire and full disclosure of all the material facts within the knowledge of the parties. The party must not only disclose those which he knows but also those things which the law presumes him to know.

#### DICTATION.

Another exception to the principle that equity will grant relief where a person is mistaken as to his present or antecedent legal rights, is in the case of compromises. Equity favors compromises and will not set them aside on the ground of mistake either of law or fact. But it must appear before the court can be asked to take this position that there has been no fraud in connection with the compromise and that all parties thereto have made a full disclosure of all the material facts.

31 S.W. 127; 97 Wy. 567; Ill. Cs. 206)  
51 Me. 68 (Ill. Cas. 181)

#### DICTATION

A compromise always embraces the surrender of some right and if a party attacks a compromise on the ground of fraud he must always return or offer to return whatever he has received thereunder otherwise he will be deemed to have affirmed the compromise.

38 Rich. 344

Courts of equity are always on the alert to ascertain if there has been any fraud or overreaching in connection with



IV. EQUITY JURISPRUDENCE. SR. 15.

a mistake of law. If a mistake of law is the result of fraud or concealment on the part of the other party it certainly will be relieved in a court of equity.

DICTATION.

A court of equity is always upon the alert to discover fraudulent or inequitable conduct and if a mistake of law has been brought about by such conduct the court will always grant relief basing its action upon the fraud and it is not necessary that the conduct of the parties be intentionally fraudulent if it is simply misleading it will be sufficient basis for the court to act upon.

Furthermore a court of equity will not permit a party to take advantage of a mistake of law by the other which he knew of and did not correct.

Pomeroy Vol. I, 135, Vol. II 847-8.  
51 Me. 324( Ill. Cases 181)

In closing what I have to say upon this subject of mistake of law, I would suggest that a court of equity will never grant relief unless the mistake is material and unless the conduct of the parties has been influenced by it. In such a case equity will interfere. The mistake must be the essence of the transaction in order that equity will interfere.

DICTATION

In order that the court may interfere on the ground of mistake of law the mistake must be material and the conduct of the parties must be influenced by it.

MISTAKES AS TO MATTERS OF FACT.

DICTATION

Jurisdiction of equity for the purpose of correcting mistakes of fact is a very general one. The general rule is that any act done or contract made under a mistake of or in ignorance of a material fact is relievable in equity. That is the general rule. That rule has some important exceptions which I will not have time to take up this morning.

---oOo---

Oct. 20th, 1903.



LECTURE V.

---oOo---

MISTAKES AS TO MATTERS OF FACT.

A court of equity, where there is no adequate remedy at law, will always give relief for a mistake of fact.

There are one or two exceptions to this general rule, but before going to a consideration of these, I would suggest that although equity is very lenient and the jurisdiction is very broad and extensively exercised in regard to mistakes of fact, yet, there are at least two classes of mistakes of fact that will never be relieved in equity. Where a mistake of fact is connected with some speculation and the mistake is in regard to the result of the speculation equity will never grant relief. Where the mistake is as to the value of the subject matter of the transaction equity will not grant relief. The question of value is largely a matter of opinion.

In order that equity may act in cases of this kind it must not only appear that there is no adequate remedy at law, but it must also appear that the mistake is a material one. The mistake must be of the essence of the contract or transaction and not merely incidental to it. The mistake must not be the result of the want of that care and diligence which a person of reasonable prudence would exercise. If it has been the result of negligence on his part the party cannot come into a court of equity and ask relief.

DICTATION

It is a general rule that equity will relieve in case of mistake of fact if there is no adequate remedy at law. Almost any mistake of fact may be the subject of equitable relief.

There are two exceptions, however, to this rule:

(1) Where the mistake is in regard to some speculative transaction; (2) Where it has to do with the value of the subject matter of the transaction.

LIMITATIONS UPON THE RULE: (1) Mistake must be in regard to a material fact, of the essence of the transaction, and, (2) must not have been brought about by the negligence of the party seeking relief.

Pomeroy Vol. II, par. 852-6.

Story, Vol. I. 140-152.

93 U.S. 55(111. Cases 214)

153 Pa. St. 34

25 Wt. 1007( 111. Cases 214.)

66 N.H. 136; 19 Atl. 1092(111. Cases 216)

75 N.Y. 55(111. Cases 220)

51 Wis. 431

8 N.W. 260(111. Cases 223)



## MANNER OF SHOWING MISTAKES OF LAW AND FACT.

If the transaction properly rests in parol, there is of course, no question but that parol evidence of the mistake is proper. It is only in cases of mistake in transactions that have been reduced to writing that any difficulty can arise. It is a general rule that parol evidence is not admissible to vary the terms of a written contract. This doctrine is made for the protection of the parties and it is assumed by the court that where a party has reduced a transaction to writing it contains all the elements of the agreement and that the writing is much more satisfactory evidence of the agreement than parol evidence. There is an exception to this doctrine, which is as equally well settled as the doctrine itself. Where the contract or contract is in writing, there is an exception to the rule of evidence that excludes parol evidence, where it appears that the case must turn upon fraud, accident, mistake or surprise. This rule was established for the purpose of preventing fraud; without the exception to the rule, in the cases mentioned, the rule itself would be turned into an instrument of fraud.

## DICTATION

## HOW ACCIDENT, MISTAKE, ETC. MAY BE SHOWN.

It is the general rule that a written contract cannot be varied by parol. If then the contract that is affected by accident or mistake is not in writing this rule will not interfere with its reformation or cancellation on the ground of mistake, but if it is in writing the rule in terms applies, but there is an exception to the rule in case of accident, mistake, fraud or surprise that admits parol evidence. The exception being as equally well settled as the rule itself. The rule was formulated to prevent fraud, but to allow it to be applied in the cases suggested would be to turn it into an instrument of fraud. This a court of equity will never permit.

20 Me. 363

101 U.S. 577( Ill. Cases 231)

## MODES AND REMEDIES IN CASE OF MISTAKE

The jurisdiction of equity in cases of mistake may be exercised either affirmatively or defensively. One of the most important of the affirmative remedies is that of Reformation.

When an agreement has been made or a transaction entered into by the parties, and in reducing such agreement or transaction to writing, through a mistake common to both parties thereto, there has been a failure to express the real agreement of the parties in the written instrument, a court of equity may reform





the instrument so that it shall truly represent the agreement or transaction.

The mistake must be mutual. Why must it be mutual? If it were granted where the mistake is confined to one party it would be making a contract for the parties. It would be forcing a contract upon one of the parties that he never intended to make. Where the mistake is unilateral all that a court of equity can do is to cancel the instrument. For in such a case the instrument is not the contract of either of the parties for their minds have not met.

It is well settled that where a suit has been properly brought to reform a written instrument on the ground of mutual mistake, the fact of the mistake and how the writing should be changed so as to conform to the intentions of the parties, may be shown by parol evidence. This evidence must be clear and convincing. It is not by any ordinary evidence that the solemn declarations of the parties incorporated in a written instrument are to be set aside. It is not simply a preponderance of the evidence, but it must be clear and convincing and go to the very root of the question. Under such circumstances a court of equity will decree a reformation of the instrument. In the language of the Supreme Court of Mass: "The proof must be made beyond a reasonable doubt and so as to overcome the strong presumption arising from the signature and seals of the parties that the contrary was the fact."

#### DICTATION

#### MODES OF RELIEF AND REMEDIES IN CASE OF MISTAKE.

The equitable relief in such case are both affirmative and defensive. The principal affirmative remedy is reformation. Another equitable remedy is cancellation. This remedy of reformation cannot be exercised except by a court of equity or by a court having equity powers. In order that a decree for reformation shall be granted the mistake must be a mutual one. But, however, if there has been a mistake by one of the parties accompanied by fraud of the other party, reformation may be granted. But in such a case it will be based upon fraud. It is necessary that the mistake be mutual, or the mistake of one party accompanied by the fraud of the other, otherwise the court would be making a contract for the parties. The exception to the rule of evidence heretofore referred to applies in such a case, but to justify reformation, either upon the ground of mistake or fraud the parol evidence must be of the clearest and most convincing sort.

151 Ill. 219; 37 N.P. 705 (Ill. Cases 779); 33 Mich. 123: 50 Md. 524: 44 N.Y. 525 (Ill. Cases 781)

Pomeroy Vol. II, 859

107 Mass. 290

I will hold you responsible for the two cases in the Case Book.



## LECTURE VI

---oOo---

CANCELLATION

## DICTATION

Where a transaction has not been legally completed because the minds of the parties have not met, as for example, where one of the parties has labored under a mistake, equity has jurisdiction to grant the remedy of Cancellation. But this jurisdiction will not be exercised where the remedy at law is adequate and complete.

Pomeroy, II, Para. 870-1; III 1377  
Town of Venice v. Woodruff, 62 N.Y. 462  
(Illus. Cases 785)

The rule as to evidence prevails here the same as in the case of reformation.

MISTAKE AS A DEFENSE TO SUITS IN EQUITY BROUGHT FOR THE SPECIFIC PERFORMANCE OF CONTRACTS.

Mistake may be urged as a defense to suits in equity for the specific performance of contracts, either for the purpose of defeating the suit or in order to modify the relief sought.

## DICTATION

Mistake may be urged as a defense in equity, particularly in a suit for the specific performance of a contract. The remedy of specific performance is discretionary and will never be granted where it will work a hardship to either party. This principle applies in case of mistake, which may of course, be urged as a defense to such a suit. Mistake in this case may also be shown by parol.

37 Conn. 16  
6 Md. 346-351

## DICTATION

A defense to a suit for specific performance on the ground of mistake may be urged by way of modifying the relief sought. If the defendant is willing to submit to a specific performance if the agreement is modified as claimed, then a decree in accordance with the modification will be allowed. Otherwise the suit will be dismissed.

13 Veasy Chan. 546  
21 Grat. 23  
2 Sanford Ch. (N.Y.) (298) 329



## REFORMATION AND SPECIAL PERFORMANCE.

There is another question that should receive attention in this connection: Can a complainant in a suit for specific performance of a written agreement allege, in addition to the ordinary averments, that there is a mistake in the agreement that is mutual or one accompanied by fraud, and change the written agreement by parol evidence, and obtain in the same suit a specific performance of the agreement as modified. Suppose, for instance, a client comes into your office and gives you a statement of facts which would lead you to believe that there has been a mutual mistake of the parties to a written agreement and desires to have the mistake corrected and to have a specific performance of the corrected instrument. But the defendant refuses to recognize this claim and says there is no mistake and will not be bound by the terms of the contract. There are two methods by which you can proceed for relief in such a case. You may first go into a court of equity and file your bill asking for reformation of the instrument, and after a decree has been granted reforming the instrument, and if the defendant refuses to carry out the terms of the corrected instrument or agreement, go again into equity and file a bill for the specific performance of the amended agreement. The question early arose in England whether the remedies of reformation and specific performance could be obtained in the same suit. The English Courts said no, but so far as I have been able to observe they say no without any very good reason for it. In a general way they will say this is impossible under the Statute of Frauds. The parol evidence that is necessary to be introduced in order to bring about the result sought cannot be introduced in the face of the positive enactment of the 4th section of the Statute of Frauds which provides that any contract or transaction in regard to real property must be in writing. Another reason that may be urged by the English court is that a contract that is to be reformed before it is to be enforced is certainly indefinite, and a court of equity will never undertake to specifically enforce an agreement unless the agreement is definite and certain and well understood between the parties.

Whatever may be the reason, the rule is as I have suggested in England and one or two of the American States, Mass. among the number. In those jurisdictions Equity will never grant the remedy of reformation and specific performance in the same suit.

But in most of the states in this country a different doctrine prevails and the complainant in a suit for specific performance may allege and prove by parol such a mistake in the written agreement as admits of the equitable remedy of reformation, and obtain a decree for the specific performance of the agreement as corrected.



## DICTATION

Can we combine in one suit the remedies of Reformation and specific Performance? In England and in two or three of the States of the Union it is held that this cannot be done. The general reason being that the statute of Frauds would thereby be violated. But in most of the states this combination of remedies is allowed, but the evidence by which the mistake is shown must be of the most clear and convincing sort.

## English Rule:

7 Ves. Chancery 211  
102 Mass. 24 (Illus. Cases 247)  
10 Me. 80

## American Rule:

4 John. Chancery 144-6  
14 N.J. Equity 43  
14 N.H. 175  
8 Mump. 230  
15 Mo. 106  
30 Ill. 228 ( Ill Cases 241)

Study the two cases in the case book.

If the proceedings for the reformation and enforcement of the written agreement is based upon fraud instead of mistake the result will vary in different jurisdictions in the same manner that it varies when the proceeding is based upon mistake. In the Code states there can be no question about the propriety of a plaintiff seeking in the same proceeding the remedy of reformation and the remedy of specific performance. Indeed, in Code states the plaintiff may go further in the same proceeding than to simply correct and then specifically enforce as corrected, he may obtain the legal remedy of a money judgment for the breach of the contract or agreement as corrected.

Most of the questions in regard to reformation and reformation accompanied by specific performance arise concerning contracts that are required by the statute of Frauds to be in writing. In the first place, by means of mutual mistake a contract may have been made to include within its terms certain lands that were not intended to be included. The general rule is in this country that parol evidence is admissible for the purpose of reforming this kind of an agreement. The reason is that the statute is not violated because no contract is made by parol between the parties, the effect of the parol evidence being to take the land out of the written contract that has been included therein by mistake or fraud. It simply cuts down the contract.





In the second place, by means of a mutual mistake, a written contract may omit certain lands that were intended by the parties thereto to be included within it. In a case of this kind, the parol evidence, if admitted, would go to show that the lands should be included within the contract and the reformation would be asked that would extend the contract to these lands. Some courts have refused relief in cases of this kind. Some very respectable American Courts, and the English Courts generally, have refused to give relief, basing their refusal on the ground that the Statute of Frauds requires a writing to create an interest in lands, and that here is an attempt to create an interest without it. The effect of parol evidence, if admitted, would be to affect the land that is not mentioned in the contract. The leading case is *Class v. Mulbert*.

But many courts of recognized standing hold that this evidence is admissible, both where the effect of the parol evidence will be to cut down the contract, and also to add to it. Further, such relief may be granted although the agreement by the Statute of Frauds is required to be in writing. These courts rely upon the doctrine that the Statute of Frauds should not be made an instrument of fraud.

If there has been a part performance, if the parties have gone into possession and put valuable improvements upon the land, then not only the Mass. Courts, but even the English Courts would permit a reformation based upon parol evidence that the lands had been omitted from the agreement by mistake.

#### DICTATION

Questions connected with reformation by parol evidence most frequently arise in case of agreements that are required by the Statute of Frauds to be in writing. In regard to such agreements two states of facts may exist (1) By mistake lands may have been included in the contract that the parties did not intend to include.

Under those circumstances the courts all agree that the mistake may be shown by parol because the effect is simply to cut down the contract, which they argue is not the making of a contract within the provision of the Statute of Frauds.

(2) But through mistake lands may have been omitted from the contract that the parties intended to include. In some states the courts, following the English decisions, hold that under such circumstances parol evidence is not admissible for the reason that the effect would be to make a contract by parol in regard to land. Other, and the most of the American Courts hold that the Statute of Frauds furnishes no objection to the use of parol evidence under such circumstances, for otherwise the Statute would be turned into an instrument of fraud.

In favor of Jurisdiction:

60 N.W. 276 (Ill. cases 237)

101 Mich. 577

---o0---

Oct. 27. 1903.



LECTURE VII.

---oOo---

58 N.H. 386 (Ill. Cases 239)

30 Ill. 228 (Ill. Cases 241)

Study carefully those three cases.

Contra.

102 Mass. 24 (Ill. Cases 247)

104 N. Carolina 16 (Ill. Cases 255)

In case of part performance of the contract, such performance including the omitted lands, all courts hold that parol evidence is admissible to correct the mistake, and that the Statute of Frauds cannot be urged as a defense.

-----

We will now pass to the next ground of relief in Equity, namely,

F R A U D

One of the occasions for the establishment of a separate court of equity in England was that there might be a separate tribunal that could deal with fraud in its various forms. Originally the law courts had little jurisdiction over matters of fraud. It was only after the introduction of assumpsit, case and trover that they began to assume jurisdiction in matters of fraud. It is through the action of Trespass on the case that the Law Courts have developed a very large jurisdiction over matters of fraud.

It has been held in England that with one exception the jurisdiction of equity exists in every case of fraud. In England the question is not whether the jurisdiction exists, but whether it should be exercised, this depending upon the circumstances. The single exception in England is that of cancelling wills obtained by fraud. It has been held that courts of equity have no power to entertain a suit to cancel a will obtained by fraud. The proper court to entertain such a suit is the Probate Court in the United States and the Ecclesiastical Courts in England.

The English doctrine in case of fraud is not recognized to its full extent in this country as a practical doctrine. As you become more familiar with the equitable doctrine concerning fraud, you will find that with us the exercise of equity jurisdiction must depend upon the circumstances of each particular case to a great extent. It is possible that the equity



courts in the United States, where the jurisdiction has not been circumscribed by statute, would hold that equity has jurisdiction in theory of all cases of fraud, but in practice the law courts exercise jurisdiction over very many cases of fraud that the equity courts never attempt to cover at the present time. The decisions of the different courts in this country are somewhat at variance upon the subject of fraud. The exercise of equity jurisdiction in case of fraud must depend to a great extent upon the circumstances of each particular case, and the nature of the remedy depends upon what will do justice between the parties. As a matter of fact, the equity courts in this country have abandoned to the law courts almost all their jurisdiction in matters of fraud which the English Courts of Equity held rested entirely within the dominion of equity. Wherever a court of law may give full, adequate and complete relief on the ground of fraud, a party will never go into a court of equity.

At the present time courts of law furnish a number of remedies that may be invoked to relieve the defrauded party. A defrauded party may treat the transaction as rescinded and recover back the money obtained from him fraudulently; or a defrauded party may suffer the transaction to stand and by a proper action recover damages which he has sustained on account of the deceit practiced upon him. Fraud may also be introduced as a defense to actions at law. But all kinds of fraud cannot be remedied by a common law action, and in many cases the capacity of the common law courts to deal with fraud is inadequate. The remedies furnished by equity in case of fraud are broader than those furnished by the common law courts. Equity has power to conform its remedies to meet the demands of justice. And in many cases the equitable remedies, on account of their elasticity, are more readily adapted to cases of fraud than are the legal remedies. In administering its remedies in case of fraud equity acts with the end in view to restore the party defrauded to the condition in which he was before the perpetration of the fraud. A court of equity when it once obtains jurisdiction in a case of fraud may grant relief which is purely equitable in nature and where the circumstances demand may grant relief pecuniary in nature.

#### DICTATION

One of the reasons for the creation of a Court of Equity was that there might be a tribunal that could furnish adequate relief in case of fraud. Originally the common law courts had practically no jurisdiction in cases of fraud. This was the case until the introduction of the actions of assumpsit, trover and trespass on the case--the equitable actions of the law. Since that time the law courts have developed a very large jurisdiction in case of fraud. But in theory, in England at



any rate, this law jurisdiction has not taken away the equity jurisdiction. It might be exercised, although as a rule it will never be exercised if there is a full, adequate and complete remedy at law. In some states the question is simplified because the legislature in conferring jurisdiction upon the equity courts has conferred that jurisdiction to cases in which there is no adequate remedy at law.

The action of Deceit although legal in form is really equitable in the result that may be obtained thereby and through it many cases of fraud may be reached. But wherever you seek relief pure and simple on the ground of fraud you may properly go into a court of equity. Fraud in equity has a wider significance than it has at law, and the remedies furnished by the equity court in very many cases are more far reaching and effective than are the remedies furnished by law.

The principal equitable remedies are the following: The Remedies of Reformation, Cancellation and Specific Enforcement. The affirmative remedy of Cancellation is one that is frequently resorted to in case of fraud. But in speaking of cancellation, I should suggest that an instrument will never be cancelled if the equity court sees that there is a complete defense to it on the law side of the court. Then we have the affirmative relief of Reformation by which a contract may be made to conform to the agreement of the parties where though fraud the written contract does not represent the real agreement of the parties. Then we may have the affirmative relief of Specific Enforcement, the effect of which is to put the parties back into the position they occupied before the wrong was committed. There are also the incidental remedies of Injunction and Receivership, also an Accounting. Sometimes equity gives a simple decree for damages. If a party has acquired property by fraud, equity may compel him to reconvey the property to the grantor and until he does reconvey, equity may treat him as a trustee for the benefit of the party who is entitled to the products of the property.

Then too fraud may always be urged as a defense in equity.

It is desirable that you should have an answer to the question: When will a court of equity in cases of fraud take jurisdiction, and when will it turn cases of fraud over to the law side of the court. It will be impossible to give an answer that will serve in every case at need, because it is impossible reconcile the varying decisions that we have upon the subject. It is only quite general rules that can be given.

#### DICTATION

The end that equity has properly in view in administering its remedies in case of fraud is the putting of the parties back into the position that they occupied had no fraud been committed.

Continued in next Lecture.





## LECTURE VIII.

-----oOo-----

(CONT'D FROM LAST LECT)

At the close of the last lecture I was attempting to clear up the matter of jurisdiction of the equity courts in regard to cases of fraud. I had started to suggest and to formulate two or three propositions that would be of general application and general help.

## GENERAL PRINCIPLES GOVERNING JURISDICTION.

(1) If the estate, right or interest that has been invaded is equitable, the jurisdiction to remedy the consequent wrong is exclusively in equity, and will always be exercised whatever the nature of the relief sought.

(2) If the estate, right or interest that has been affected by the fraud is legal and the consequent wrong can be reached by a remedy that is purely equitable, the jurisdiction to grant that relief rests in equity exclusively. But a court of equity will not generally be granted if the party can get full relief at law. For example if a contract is obtained by fraud, the wrong that has resulted can be reached through the purely equitable remedy of cancellation. But although equity has jurisdiction to cancel the instrument, a suit for that purpose will not be sustained when the fraud can be set up as a defense to an action on the contract, and there are no special circumstances which prevent such defense from being a complete, adequate and certain.

## DICTATION

(2) If the right, estate, or interest that has been affected by fraud is legal and the consequent wrong can be reached by a remedy that is purely equitable, the jurisdiction to grant that remedy rests in equity exclusively. But the remedy will not generally be granted if the party can get full relief at law. In order that it may be granted there must be special circumstances calling for equitable interference.

If the right, title or interest which has been affected by fraud is legal and there is a remedy in equity for the wrong which is pecuniary and in effect legal, the jurisdiction of equity over the matter is concurrent with the jurisdiction at law. But the equity court will never take cognizance of the matter where full relief can be had at law.

The whole subject can be summed up in the single statement: In cases of fraud, the jurisdiction of equity to grant purely equitable remedies will not be exercised, and the concurrent jurisdiction to grant pecuniary relief should not be invoked,



in any case where the legal remedy, either affirmative or defensive, will be in all particulars adequate and complete.

Pomeroy Vol. II, Para 910-11

Bigelow on Fraud, page 41-62.

Eaton on Equity, pp 283-5.

I will give you three cases which I wish you to read:

52 N.H. 609 (Ill. Cases 258)

119 U.S. 347 (Ill. Cases 261)

31 Mich. 367 (Ill. Cases 264)

### FRAUD IN EQUITY

Fraud in Equity is divided into:

(1) Actual, and;

(2) Constructive Fraud.

We have actual fraud where through a false representation of any kind, or through fraudulent concealment, a party has been so placed that he has lost either contract rights, property rights or personal rights, that it would be against equity and good conscience to remedy. Actual fraud consists of acts of direct imposition upon the party who has suffered.

Constructive fraud is something that the law imposes under certain circumstances and it may exist even in the absence of any intention to deceive on the part of the person guilty.

If we examine these acts in detail we will find that they consist of fraudulent representations and fraudulent concealments, and the whole subject of actual fraud in equity may be discussed by an examination of what constitutes fraudulent representation and what constitutes fraudulent concealment, and that is what I shall next proceed to do.

### DICTATION

Actual fraud exists where a party has suffered from acts of imposition, where there has been positive wrong doing, although arising in many different kinds of transactions, actual fraud consists in reality of two forms only, namely:

(1) FALSE REPRESENTATION;

(2) FRAUDULENT CONCEALMENT.

False or fraudulent representation, in order to constitute fraud must contain certain elements. And in order to discuss this subject fully and intelligently, it is necessary for us to refer to these different elements. In the first place, the false representation must be the affirmation of some fact, and not a mere matter of opinion or judgment. For example let us suppose that the subject matter of a transaction is a piece of real estate that is to be conveyed and the vendor gives it

as his judgment that the estate is worth forty dollars per acre.



Let us suppose that the land is not worth more than twenty dollars an acre. Is that such an affirmation of a fact that it would be a basis of an action to set aside the transaction on the ground of fraud. No. That is a mere expression of an opinion. The other party has an opportunity to find out the truth of the statement. But suppose the party says he has been offered forty dollars an acre for the land. There we have a representation of a fact, and if such representation has been relied upon and has been material in inducing the party to enter into the transaction it will give equity jurisdiction to set aside the transaction on the ground of fraud. If the statement is of something that may take place in the future, under those circumstances, the statement as a rule will be regarded by the courts as an expression of an opinion and will not be a basis for an action to set the transaction aside. Wherever the property is equally open to the inspection of both parties, no misrepresentation apparent on inspection, would avoid the contract. If the party so making the representation is better able to give an opinion and to know the facts, if he is so situated that what he says will particularly influence the other party, under such circumstances, it would be the affirmation of a fact, and if untrue, would give a right of action in equity on the ground of fraud, if an equitable remedy should prove to be the proper one. For instance, here is a man who owns lands in the state of Mich. and County of Washtenaw. He resides in the State of Penn. and has never seen the lands and knows nothing of their value. He has an agent here who takes care of the property and send him the rents and profits. A party who owns lands close to this piece of property desires to purchase this land, he goes to the agent and he names a price which he says is too high. He then goes to the state of Pa. and tells the party who owns the land that the same is in a run down condition, that land in that vicinity has depreciated in value, that this property is near the city of B and that land in that vicinity has depreciated greatly because the Court house is to be removed to another town, and that he will pay a certain price named, but much lower than the price named by the agent, and much less than the actual value of the property. He says that he will pay that price, but that it is mere matter of sentiment that induces him to do. He says that his wife was born upon the property and desires him to purchase it, and it is for his wife's sake that he desires to purchase. The party then sells the lands to him. If these statements had been made in the County of Washtenaw where the land was situated, the party would not have been justified in relying upon them. But made



under the circumstances that I have suggested, the court very properly held that they were a basis for a proceeding to set the conveyance aside on the ground of fraud.

DICTATION

ESSENTIAL ELEMENTS OF A FALSE REPRESENTATION.

In the first place, there must be the affirmation of some fact, and not a mere matter of opinion or judgment.

Pomeroy, Vol. II, 877

Bispham, 207

Any statement in relation to the past is, as a rule, the statement of a fact, but any statement as to the future in connection with the subject matter of the transaction is, as a rule, the statement of opinion merely. Whenever property is equally open to the inspection of both parties, no misrepresentation as to a fact apparent upon inspection will avoid the contract. Otherwise, however, where one of the parties has superior opportunities for knowing as to the condition of the property.

103 Mass. 382

Ordinarily the expression of a mere intention is not binding, and a mis-statement in that regard would not constitute fraud, but if one in order to influence another asserts that he has a present intention, when he has not, in fact, such an intention, that would be regarded as a false statement of fact.

Law Rep. 29 Chanc. Div. 459.

---000---

Nov. 2nd, 1903.





## LECTURE IX.

---oOo---

This affirmation is usually made by means of language written or spoken, although it is not necessarily so. It may be by means of the conduct of the party. Under such circumstances, the court will grant relief the same as though the fact was verbally stated. As for instance, a fraudulent representation may consist of fraudulent experiments, as in connection with a contract concerning a patent.

A false representation cannot be a mere matter of opinion. The law assumes that parties to a transaction are equally competent, if not laboring under any disability, to form an opinion on the subject matter of the transaction. Thus a man has a right to praise a commodity that he is offering for sale, provided he confines himself to a mere expression of opinion.

The expression of an opinion, under some circumstances, may amount to a fraudulent representation, as where for example the party is an expert in regard to the subject matter of the transaction. Under such circumstances the expression of an opinion would be equivalent to the affirmation of a fact.

## DICTATION

The mere expression of an opinion would not be grounds for relief in equity. But where the expression of an opinion is a fact material to the transaction, then the statement that such an opinion exists is the affirmation of a fact. Illustration: If the party to the transaction were an expert his opinion may be a material fact.

Pomeroy, Vol. II, para. 878

30 N.J. Eq. 82

23 Mich. 99

The representation must be made with the design of inducing the other party to act. If it is made idly and incidentally and without any expectation that it will induce the other party to act, although the representation may be false, it cannot be used as a basis of an action to set the transaction aside on the ground of fraud. The design of the party making the representation to induce another to act may under certain circumstances be presumed. If the representation is of such a character that it would naturally induce any ordinary person to enter upon any particular line of conduct, and is in fact followed by such conduct on the part of the person addressed, then it will be presumed that such representation was made with a view to inducing that person to act as he has acted.



## DICTATION

(2) The representation must be made with a design of inducing the other party to act.

Pomeroy, Vol. II, para. 879.

33 Me. 17

But the design may be inferred where the natural consequences of the representation would be to induce an ordinary man to act.

83 N.Y. 31

Pomeroy Vol. II, para. 880

(3) The representation in order to be fraudulent must be untrue. If there are several statements, all of which have induced action and any one of them is untrue, the transaction may be set aside.

Pomeroy Vol. II, para. 880-2.

The fourth essential, which is the most important, has to do with the knowledge or belief of the party making the statement. There must be a knowledge or belief of the party making a statement upon which another acts, and which proves to be untrue, as to its falsity, in order that his statement may be regarded as a false representation and the transaction avoided in a court of equity. Now according to some authorities there is a difference between the theory of equity in regard to this matter and the theory by which the law courts are governed. If a party makes a statement which he knows to be untrue, and it possesses all the other elements essential to a fraudulent representation, there can be no doubt but that the transaction may be set aside. But the facts may show this: that the party making the statement does not know anything about the subject matter of the transaction, and he makes the statement recklessly in regard to it without even believing it to be true. Under such circumstances is he guilty of fraud? Under such circumstances it would be regarded as fraudulent both in law and equity. Let us suppose this state of facts: A party makes a representation of a fact, not intending to mislead the defrauded party, believing it to be true although he does not absolutely know it to be true, but has no sufficient grounds for reaching such a conclusion. He would not make such a statement if he thought the party would be defrauded thereby, but he makes it recklessly and without regard to the consequences. Under such circumstances, if the statement turned out to be untrue, would the party be guilty of fraud? In some of the states such a statement would not be regarded in law as fraudulent, but it would be regarded as fraudulent in equity, and I may say that generally in this country and in England a statement of that kind would be regarded as fraudulent in equity. According to some authorities, there can be no fraud at law, unless there is a moral obliquity, whereas on the equity side of the court, according to all



authorities, there may be fraud without any intention on the part of the person guilty, as in the case last stated.

DICTATION

(4) The fourth essential element has to do with the knowledge and belief of the party making the statement.

What must be the knowledge or belief of the party making the statement as to the falsity of his statement in order that the statement may be regarded as a fraudulent representation?

(a) If a party makes a statement and has at the time knowledge of its falsity, he will be chargeable with fraud both at law and in equity.

Law Reports 5 Bq. Cases 249

(b) If a person makes a statement that is untrue and at the time has no knowledge in regard to the matter and no belief in its truth, then he is chargeable with fraud both at law and in equity.

42 Vermont 68

(c) If a person makes a statement that is actually untrue, but he has at the time no knowledge in regard to the matter, although he believes it to be true, he will be guilty of fraud in equity, although he did not intend to mislead thereby. In some states, however, he would not be held guilty of fraud at law.

Pomeroy, Vol. II, para. 887

32 Iowa 567

61 N.Y. 145-152

92 Ky. 176 (Ill. Cases 280)

121 Ill. 186 (Ill. Cases 266)

9 Colo. 33 (Ill. Cases 270)

62 Ill. 498 (Ill. Cases ~~498~~ 272)

142 Ill. 96 (Ill. Cases 285)

In some of the states, this proposition discussed under the head of (c) applies both at law and in equity, but in England and some of the states, it only applies to equity. In these jurisdictions in order to have fraud at law there must be some moral obliquity. There can be no legal fraud in the absence of moral fraud.

Pomeroy, Vol. II, para. 884

153 N.Y. 604

47 N.E. 923 (Ill. Cases 282)

If a party makes a statement that is untrue, but which he believes to be true, the statement being based upon facts that would naturally lead a fair minded man to the same conclusion, then he is not guilty of fraud either at law or in equity.



IX. EQUITY JURISPRUDENCE. SR. 33.

Pomeroy, Vol. II, para. 888

Kerr on Fraud and Mistake, pp. 57, 67, 68.

But if the party subsequently discovers his error, then it is his duty to correct the statement, otherwise he will be guilty of fraud.

And the party will be held responsible where a duty to know the facts rests upon him, as in cases where there is a fiduciary relation between the parties.

-----oOo-----

Nov. 3rd, 1903.



Source: UNFPA, 2004

100



## LECTURE X.

-----oOo-----

At the close of the last lecture I was calling your attention to the necessary elements of a fraudulent misrepresentation. If a representation is made by a party that is untrue, but the party at the time he makes it believes it to be true and his belief is founded upon facts that would lead an ordinary mind to believe that it was true, then the representation would not be regarded as fraudulent either in equity or in law.

But if the party making the statement subsequently learns that the facts are untrue, then it is his duty to communicate that fact to the party to whom the representation has been made, otherwise he will be guilty of fraud.

And the party will be held responsible where a duty to know the facts rests upon him, as in case where there is a fiduciary relation between the parties. The party occupying the position of trustee occupies a superior relation to that of the other party so equity imposes this obligation upon him. This qualification would apply to the relation to principal and agent, and attorney and client.

## DICTATION

There are some cases where a party is bound to know the truth and where he cannot shield himself behind the last proposition given. As for example in all cases of trust relations.

Kerr on Fraud and Mistake, pp. 68-9.

61 Pa. st. 427-30.

(5) The representation must have been relied upon by the party to whom it is made, in order that it may be the basis of an action in equity.

125 U.S. 247 (Ill. Cases 275)

(6) The representation must have been material.

Pomeroy, II, para. 898-890

15 Me. 225

The representation need not have been the sole inducement, it may still be fraudulent although accompanied by other inducements.

11 Wend. (N.Y.) 375

In order to claim relief in equity on the ground of fraudulent misrepresentation, the party must have been so situated that he was justified in relying upon the statement made to him. If the statements were upon their face so extravagant and absurd that they would not deceive a person of ordinary intelligence, they would not be a basis for a proceeding in equity. Neither is a person justified in relying



upon vague, loose, and unimportant suggestions.

The same result follows where the party to whom the statement is made has made independent inquiries. Notwithstanding the representation be ever so false, if the party to whom it was made has made independent inquiry and relied upon that inquiry, then the transaction will not be a basis for setting the transaction aside on the ground of fraud.

If a party seeks to avoid a transaction on the ground of misrepresentation and is met by the proof that he was not deceived because he was aware of the facts, under such circumstances he would have no action, but the proof of such knowledge must be most clear and conclusive. The presumption would be that the party has acted upon the representation as made to him.

#### DICTATION

The party must have been so situated that he was justified in relying upon the statement. Cannot properly rely upon extravagant statements.

18 Me. 418

Or upon vague or uncertain statements.

Bispham. 215

Neither can the party take advantage of a misrepresentation if he himself has made independent investigation and relied upon such investigation, but the proof in regard to such investigation must be most clear and conclusive.

Kerr on Fraud and Mistake, 75-8-9

The party particularly has a right to rely on representations where the person making them is so situated that he must be presumed to know the facts.

#### Additional Authorities.

142 Ill. 96 (Ill. Cases 285)

23 Mich. 99

Pomeroy II, 894.

Mere advice to consult Attorneys or friends will not do away with the effect of a fraudulent representation.

Pomeroy II, 897

47 Mich. 94

As soon as the misrepresentation is discovered prompt action should be taken by the party who has been deceived thereby. He cannot go on and reap all the possible benefit out of the transaction and then seek to be relieved from his obligations. A man may have a good case and fail to get relief



because of laches.

#### DICTATION

Action must be brought to set aside the transaction as soon as the fraud is discovered, otherwise it will stand.

Pomeroy, II, 897, note 1.

The second of the forms of fraud in equity is  
FRAUDULENT CONCEALMENT.

Fraud may arise from silence as well as from spoken representations. Silence when it is a man's duty to speak is fraud and is condemned by equity. A misrepresentation may be made without the party making it intending any fraud, without the party making it knowing that it was a misrepresentation. But in case of a fraudulent concealment there must be knowledge on the part of the party suppressing the information and an intention not to disclose such facts. A party cannot be guilty of fraudulent concealment without at the same time being guilty of some moral turpitude. We cannot conceal anything that it is his duty to divulge without acting contrary to the moral law.

The general doctrine in regard to fraudulent concealment may be stated thus:

A party is guilty of actual fraud if he conceals some fact that is material to the transaction in which he is engaged and which it is his duty to disclose.

This is the general doctrine. It must be supplemented by the inquiry, "when does the duty rest upon a party to disclose those facts?"

#### DICTATION

Concealment is fraudulent where it is a man's duty to speak just as much as is a false representation.

Pomeroy II, 901

When is it a man's duty to speak and when will he by silence be guilty of fraud? There are three occasions under which a man is laboring under a duty to speak:

(1) Where there is a fiduciary relation existing between the parties. It is the trustee's duty to disclose everything in connection with the transaction that is material to it and that may operate upon the mind of the other party to the transaction. That trust relation need not be an express trust relation, it may be an implied quasi trust relation existing between the parties, as for example the relation that exists between Principal and Agent, Attorney and Client. Wherever there is a trust relation the duty to disclose fully rests upon the party occupying the superior position. The duty to disclose



exists, wherever, though there may be no express fiduciary relation between the parties, one of the parties to the transaction reposes especial trust and confidence in the other party. Then too a duty to disclose exists where the transactions surrounding the parties indicate that a fiduciary relation really exists, though not expressly stated and altho not expressly imposed by any language of the parties.

#### DICTATION

A duty to disclose and a failure to disclose will be fraudulent where there is an express or quasi-fiduciary relationship between the parties, such as exists between the trustee and cestui que trust. Secondly where a trust relation has been raised by one of the parties putting himself in the hands of the other. Third, where such relationship may be implied from the facts surrounding the case.

36 N.J. 174(Ill. Cases 289) .  
Law Rep. 2 Chanc. Div. 55(Ill. Cases 330)  
90 Vermont 533(Ill. Cases 295)  
179 Pa. 146(Ill. Cases 297)

Fraudulent concealments occur more frequently in contracts of sale, probably, than in any other contracts or transactions. As to duty of the vendee: If the relations of the parties to a contract of sale are such as to bring them within either of the rules that I have suggested, any failure of the vendee to disclose a material fact would be a fraudulent concealment. But in the absence of such relationship and under ordinary circumstances, no duty rests upon the vendee to disclose. The vendee may be aware of a peculiar value that attaches to a piece of property, which, if known to the vendor, would cause him to refuse to enter into the contract or to demand a higher price for the property; yet in the absence of a fiduciary relation or in the absence of a particular trust or confidence between the parties, the vendee is under no obligations to re-eal this value.

Some courts have held to the contrary. In a case in Kentucky the vendee discovered valuable salt springs upon a piece of land and bought the land without disclosing that fact. That transaction was set aside on that ground.

#### DICTATION

As to the duty of the vendee to disclose in a contract of sale it may be stated that in the absence of a fiduciary relation as explained, he is not bound to disclose any special





value of the property, - as a mineral value for example.

24 Mich. 335

158 Pa. St. 263(Ill. Cases 287)

62 Ill. 498(Ill. Cases 272)

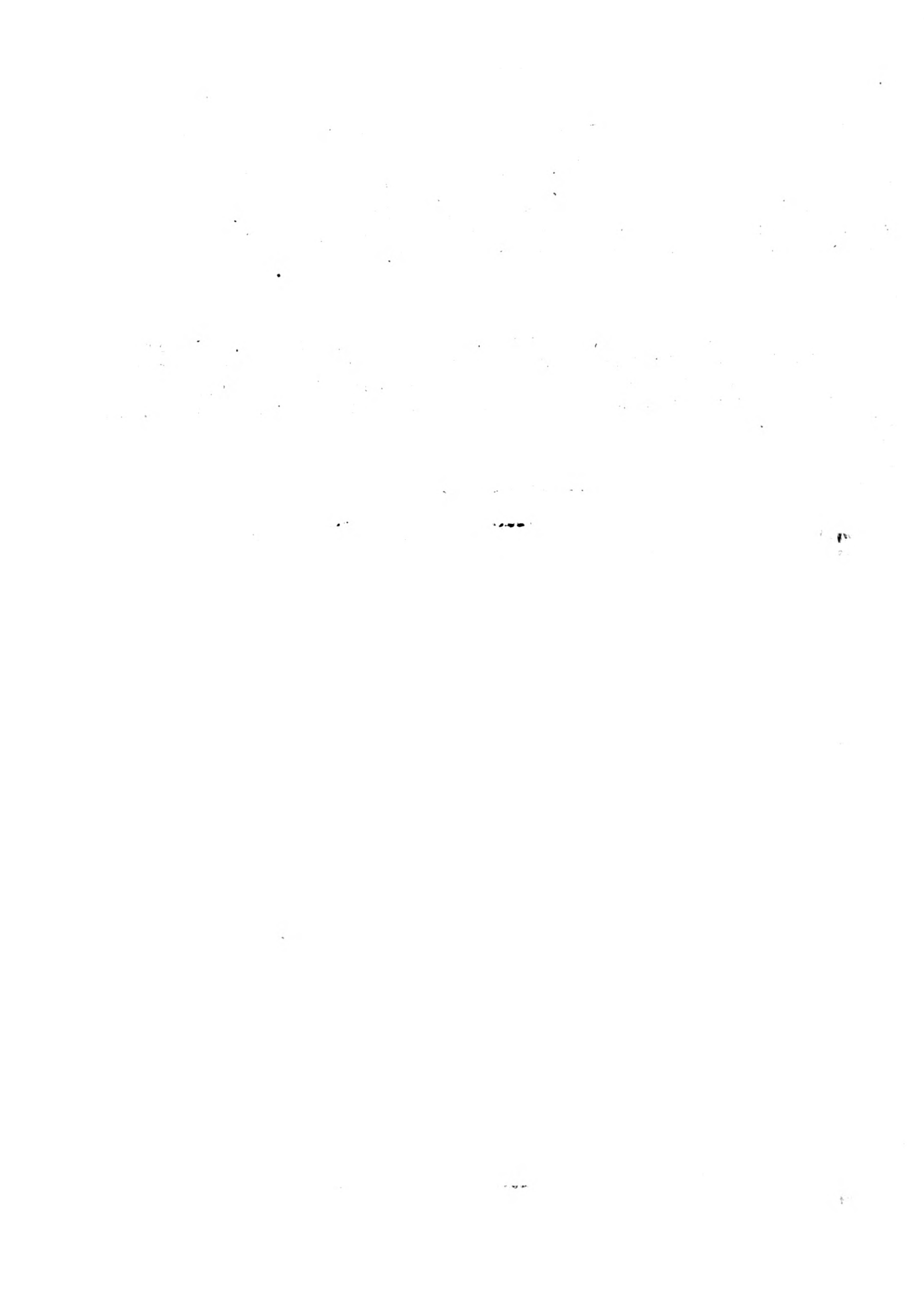
It is only silence, however, that is permitted. Any word or act that tends to draw away the attention of the vendor, would be regarded as fraudulent.

#### DICTATION

It is only silence, however, that is permitted. If in addition to silence there is any word or act that tends to mislead and to hurry the vendor into a bargain that he would not otherwise have made, will be a fraud of which equity will take cognizance.

-----oOo-----

Nov. 9th, 1903.



LECTURE XI.

-----oOo-----

DUTIES OF VENDOR.

The duties as to disclosure by the vendor are much the same as those resting upon the vendee. He is not ordinarily bound to disclose any more than the vendee. Where the parties occupy a relation towards each other that has nothing in it of confidence or trust, the vendor no more than the vendee is bound to disclose, but if any one of these trust relations exists that I have considered in connection with the vendee, then a full disclosure on the part of the vendor must be made. It should be observed, however, that the fiduciary relation as affecting the vendor is more frequently implied than in the case of the vendee, because the vendee more frequently reposes special confidence and trust in the vendor.

DICTATION

The duties as to disclosure as to the vendor are practically the same as those which apply to the vendee. He is never bound to disclose unless some one of the fiduciary relations exists.

39 N.Y. 343

40 Calif. 146

But the vendor probably is compelled to disclose more frequently than the vendee for the reason that the vendee more frequently than the vendor puts himself in a situation where he depends upon the statements of the other party to the transaction.

Pomeroy, II, 904

Where a contract is fiduciary in its nature, like insurance contracts, full disclosure must be made.

2 Ohio St. 452.

Pomeroy, II, 907

If the vendee desires to protect himself against fraudulent concealment or fraudulent representation on the part of the vendor he should procure a warranty from the vendor.

I should not leave this subject without suggesting some of the remedies that may be applied in cases of fraudulent representations or fraudulent concealments. It is not every case, as you well know, that calls for equitable relief. There are a great many cases where you can go on to the law side of the court and get relief. You may rescind the contract at law and sue for whatever has been paid on the contract, or you may affirm the contract and sue for the damages you have sustained. In such cases where the legal remedy is entirely adequate there is no necessity for going into a court of equity.



Whether there is an adequate remedy at law depends largely upon the individual case. If you conclude that a court of Equity is the proper tribunal for the adjustment of your wrongs, you must first select your remedy. And the ordinary remedy for fraud is the Remedy of Rescission or Cancellation. The defense of fraud may be urged in cases for the specific performance of the contract. The Remedy of Reformation is open where there is mistake by one party accompanied by the fraud of the other.

I will next take up the subject of,

### C O N S T R U C T I V E F R A U D .

Constructive fraud is a more difficult subject than actual fraud. Untruth is an essential element in actual fraud. It is never so in constructive fraud. Constructive fraud is simply a term descriptive of certain acts or contracts which equity regards as wrongful, and for which the court will furnish to the parties injuriously affected the same remedies that it furnishes in cases of actual fraud. Equity says that wherever certain conditions or situations exist the law will assume that it is a fraudulent situation. Wherever certain contracts are entered into between certain parties situated in a particular way, equity will assume that those contracts are fraudulent. Actual fraud must be proved, it cannot be assumed; constructive fraud need not be proved. All you have to prove is the situation that equity will recognize as developing constructive fraud. For example there are contracts that the law says are against public policy, equity will presume those contracts are fraudulent. This is a presumption that may be overcome by proper evidence. The situation of the parties is sometimes such that equity says that they cannot deal with each other on the same basis. For example, contracts which are made between an aged father and a son in the full vigor of his youth. A contract is made between them in which the father is apparently taken advantage of. If it is apparent that the father is under the influence of the son, equity will not require that the father show actual fraud then he proceeds to have the transaction set aside. All that is necessary to be shown is that the son occupied a superior position to the father. Just as soon as that is shown equity will conclude as a matter of law that the contract was fraudulent.

### DICTATION

Untruth is the characteristic of actual fraud, but in the case of constructive fraud it is never essential that there should be untruth between the parties. Constructive fraud is a term descriptive of the results that equity raises out of certain contracts, conditions or out of the relations of the parties to one another. Constructive fraud is the fraud



XI. EQUITY JURISPRUDENCE. SR. 41.  
that the law presumes from the very existence of certain contracts or certain relations. In making out a prima facie case all that needs to be done is to show the contract or condition or relations of the parties.

Pomeroy, II, 922

Constructive fraud may be discussed under three different heads. The authority for so doing is found in the celebrated case of Earl of Chesterfield v. Jensen, in which Lord Hardwicke delivered the opinion of the court. Lord Hardwicke divided constructive fraud into:

- (1) Fraud apparent from the intrinsic nature and subject of the bargain itself;
- (2) Fraud presumed from the circumstances and condition of the parties contracting;
- (4) Fraud inferred from the nature and circumstances of the transaction as being an imposition and deceit on other persons not parties to the transaction.

#### DICTATION

The Constructive Fraud of Equity is embraced within the three classes made by Lord Hardwicke in

Earl of Chesterfield v. Jensen, 2 Ves. sr. 125

- (1) The first of these classes embraces fraud apparent from the intrinsic nature and subject of the transaction itself.
- (2) The fraudulent character of a transaction may be inferred from its nature because of its terms.

Thus a transaction may be fraudulent on account of inadequacy of consideration, if the inadequacy is so great as to shock the conscience of the court, and to furnish satisfactory evidence of fraud.

#### DICTATION

Inadequacy of consideration may be so great as to stamp the contract as fraudulent, but the court of equity will ordinarily interfere on this ground only when the inadequacy is such as to shock the conscience of the court.

45 N.J.Eq. 5 (Ill. Cases 301)

48 Mich. 373

50 Mo. 438

If, however, the inadequacy of consideration is accompanied by inequitable conduct, the court of equity will always interfere.

Pomeroy, II, 928

Bargains for conveying away an expectancy for a small consideration may always be successfully attacked in equity on the ground that they are constructively fraudulent.





LECTATION

Usurious contracts are constructively fraudulent where there are statutes against usury. So are all gaming and wagering contracts. They are regarded as constructively fraudulent and will be set aside by a court of equity.

Pomeroy II, 929-930

Bispheam, 23-3.

(b) A contract may be inherently fraudulent on account of its subject matter. For example marriage brokerage contracts, -contracts by which one party for consideration agrees to negotiate or procure a marriage for another. Contracts of this kind are void as against public policy. Contracts of this kind were good at the civil law, but at common law such contracts have always been held illegal and equity has from the earliest period of its jurisdiction regarded them as utterly void. What I have said is equally applicable to contracts in restraint of marriage; also contracts or agreements to compensate a parent or guardian for procuring or consenting to a marriage with his daughter or ward or secret agreements of any kind the object of which is to promote a particular marriage. All such agreements are constructively fraudulent. But a condition in a contract or agreement that will result in a partial restraint of marriage is not void, for example, a condition that a person shall not marry a particular person, or that a person shall not marry until a certain time, those conditions are not void. If the condition is reasonable equity will not regard it as constructively fraudulent.

LECTATION

Marriage brokerage contracts are constructively fraudulent and will always be set aside.

115 Calif. 252

81 Ky. 321

124 N.Y. 156

7 Mass. 112

Pomeroy, II, 931

Story, I, 260-70

Contracts in general restraint of trade are constructively fraudulent, and will be set aside at the suit of the injured party. The question is in such a case, not whether the restraint is universal in character, but whether it is unreasonable. If unreasonable, the courts will regard it as constructively fraudulent and will rescind the contract.

104 Ga. 188 (111 Cases 303)

27 Mich. 15, notes.

31 Mich. 490

160 Mass. 50

103 U.S. 261



## LECTURE XII.

-----oOo-----

There is a class of cases that are constructively fraudulent and that will not be sustained in a court of equity, and I refer to contracts made in view of the improper controlling of official conduct. Such contracts are opposed to public policy, and are constructively fraudulent and will be set aside in equity.

Contracts in which one party agrees to procure official employment for the other are constructively fraudulent.

Lobbying contracts are constructively fraudulent. A party may properly appear before the proper legislative committee and urge the passage or defeat of a bill, and a contract so to do would be upheld; but a party cannot agree to use personal influence upon individual legislators. Contracts that are secret and underhand made with individual members of the legislature for the purpose of controlling legislation are constructively fraudulent and will not be upheld. It is proper for an attorney to agree to furnish his services before the legislature as a whole in arguing a pending bill.

Contracts that have in view the improper influencing an executive are also constructively fraudulent. It is perfectly lawful for an attorney to agree for a consideration to go before an executive and presents arguments that in his judgment or that of his client should lead the executive to take a certain line of action, but contracts in which the personal or individual service of the attorney or party is to be brought to bear upon the executive are constructively fraudulent. As for example, where a party agrees to use his personal influence on the ground of previous service to the executive or to use his political influence to obtain a certain result those are constructively fraudulent.

## DICTATION

Under this head we have a group of cases that have in view the improper controlling of official conduct, like for example, the procurement of official position.

14 Nevada 175

2 Mo. App. 82

Renard on Public Policy, 357



Or the improper controlling of legislative conduct--lobbying contracts. These are illegal.

100 Pa. St. 561

43 Wis. 344

64 Ga. 704

54 Iowa 301

Contracts improper in influencing executive action.

Pomeroy II, 935

All contracts the subject-matter of which is contrary to good morals are condemned by courts of equity, and are illegal and void in equity, and generally at law.

Pomeroy, II para. 936

I will now pass to the second division of the subject, namely that species of fraud which is presumed from the circumstances and condition of the parties contracting. Under this head may be grouped a large variety of cases. All of these cases depend upon this principle: That in order that a contract may stand in a court of equity, there must be full and free consent on the part of the parties to the contract or transaction. The consent required by equity is much fuller and freer than the consent required by law. This class embraces those cases in which the transaction is condemned because of the absence of the absolute consent that is required by courts of equity. In order that that consent which equity requires shall exist the parties contracting must be physically and mentally capable of consenting. The parties entering into the contract may be so circumstanced that equity will hold that there is the absence of that full and free consent which the court requires before it will sustain a transaction. In these cases there is no actual fraud necessarily present, but the situation is such that the court will assume that the contract has been procured by fraud. So if a party is suffering under duress--great financial duress and advantage is taken of his necessity, contracts entered into under such circumstances may be regarded as constructively fraudulent. Or if the party is mentally clouded so that it is impossible for him to comprehend the situation that he is entering into, a contract entered into under those circumstances is constructively fraudulent. But this presumption may be removed. This group includes contracts absolutely void on account of entire absence of capacity; contracts that are voidable only, and those that are only presumptively invalid. Contracts and transactions of parties totally incapacitated, contracts of idiots and lunatics or generally deemed to be invalid in equity. Some speak of them as void and others as voidable, but for the purposes of this discussion it makes no difference.



All transactions with persons non compos are constructively fraudulent and will be set aside, but if it appears that the contract was for the benefit of the non compos, and that there has been no over-reaching, and that the party has sufficient mental ability to understand the transaction, then it may be sustained. In the first instance the contract is prima facie fraudulent, and the burden of proof is upon the other party to show that the non compos was not taken advantage of.

#### DICTATION

Cases falling under this head are those where there is an absence of that absolute consent required by equity. This consent must involve physical, mental and moral capacity necessary to enter into the contract. Thus contracts entered into with non compos persons are constructively fraudulent.

Pomeroy, vol. II, 946

42 Mich. 135

49 Mich. 192

But contracts of this kind may stand if the presumption of their invalidity is overcome by a full showing that the transaction was for the benefit of the incapacitated person.

Kerr on Fraud and Mistake, 144-5.

So too if the party does not know of the insanity and the contract is a fair one, it will usually be sustained.

44 Iowa 229

Where there is extreme mental weakness, though not amounting to legal incapacity, a transaction is presumptively fraudulent. It may be set aside without the showing of any other incident. When the extreme mental weakness has been shown, the burden of proof rests upon the other party to the transaction to show that it was fair and that no advantage had been taken of the mental weakness.

#### dictation

In case of extreme mental weakness, though not amounting to legal incapacity, the transaction will be constructively fraudulent and will be set aside unless the presumption can be removed by a showing that full consideration has been paid and that the transaction is not to the disadvantage of the person who is laboring under the weakness.

94 U.S. 511(313)

113 N.Y. 462(316)

Study these two cases carefully.

The line between extreme mental weakness and actual lunacy is very hard to draw and the courts do not attempt to





lay down any general rule, but decide each case upon its particular circumstances.

#### DICTATION

Whenever there are unequitable incidents like undue influence, inadequacy of price, misrepresentations, etc, equity will set aside the contract, but it will not do so on the ground of actual fraud.

A transaction may be constructively fraudulent if entered into with a person in great pecuniary necessity, for the reason that a person so circumstanced might not be able to give that full and free consent required by a court of equity. A man in financial difficulties is in a state where he is willing to sacrifice his rights. Under such circumstances he will do what no ordinary business man will do in ordinary circumstances. For example, a party agrees with another in financial distress, that he would endorse his notes for him for a two thirds interest in his business. He simply lent his name for a short time to tide him over his difficulty. The court set the contract aside as fraudulent because the party was not in such a condition to give a full and free consent to the contract.

#### DICTATION

A court of equity may set aside a transaction that has been entered into by a party in great pecuniary distress upon the theory of the absence of that full consent required by equity. Courts do not often do this unless some other inequitable incident is present.

Further, a contract entered into with a party when he is under duress is constructively fraudulent and will be set aside.

31 Wis. 303

7 Wall 205 (Ill. Cases 319)

Contracts with persons totally incapacitated by reason of intoxication are constructively fraudulent. If the person is so intoxicated as to be unable to comprehend the nature of his act it is invalid because it lacks that consent which equity requires. Such an intoxication is a ground for equitable relief even in absence of fraud or undue advantage by the other party.

#### DICTATION

A contract with a person incapacitated by intoxication is constructively fraudulent.

Continued in next lecture.



## LECTURE XIII.

-----:~::~:-----

Continued from Lecture XII.)

But courts are not ready to act in cases of this kind usually unless they find some element of actual fraud.

Pomeroy, vol. II, 949

72 Ill. 108

89 Virginia 576

1 N.J. Eq. 346

-----

:~::~:

There are certain relations that equity regards with suspicion; there are certain relations from which fraud will be presumed if contracts are entered into between the parties. E.g., fiduciary relations. In every fiduciary relation there is in law an implied condition of superiority on the part of the one having the fiduciary duties to perform. This condition of superiority is supposed to carry with it its influence and to affect the transactions entered into between the parties, and every transaction entered into between the parties by which the superior party obtains an advantage over the other equity presumes it to have been obtained by reason of this superior influence. There is a presumption against its validity. If you show the existence of the fiduciary relations between the parties and stop there, and the case stops there, you have made out a prima facie case and the transaction will be set aside. But the other party may overcome the presumption by showing that the transaction was open and above-board, and that there was no special advantage taken to himself, and that it was entirely fair to the other party. There must be a showing made that there was a fair and full disclosure of all the material facts by the superior party and that no advantage has been taken of the relation; and that the transaction has been fully acquiesced in by the cestuy que trust and that he is capable of acquiescing and is not laboring under any disability. For example it is regarded as improper for a trustee when he sells lands in his trust capacity to become a purchaser of that property. It is presumptively fraudulent and the cestuy que trust may have it set aside. Neither can he ~~become~~ sell his own property to the trustee either directly or indirectly. It is a transaction that is presumptively invalid.



The relation of attorney and client is one of the closest known to the law, and all transactions between attorney and client must be open and above-board, and with a full understanding and disclosure on the part of the attorney. Such transactions are presumptively fraudulent in the first instance provided the transaction has to do with that subject matter which the attorney was engaged to do business about. He cannot properly make a conveyance or take a sale of land to himself from his client excepting upon the fullest disclosure and upon a full and adequate consideration being paid.

An attorney in drawing a will, cannot properly incorporate therein a devise or bequest to himself.

#### DICTATION

In obedience to the principle that there must be full consent on the part of all the parties to a transaction, equity regards as constructively fraudulent contracts made between parties occupying a fiduciary relation in regard to property that is in any way affected by that relation. A trustee, for example, cannot properly purchase trust property either directly or indirectly. The principle applies to trustee and cestuy que trust, Attorney and Client, Guardian and Ward, Administrator and Heirs, Principal and Agent, and to all relations where there is either an actual trust relation or where there is a quasi-trust relation.

143 Ill. 513 (Ill. Cases 336)

84 Ky. 219 ( Ill. Cases 333)

Pomeroy, II, 955-65.

Bispham, 231, 239.

Where there is no fiduciary relation, still if the transaction is the result of undue influence exerted by one party upon the other such as to prevent any true consent, though not of the kind amounting to actual fraud, equity will regard the transaction as constructively fraudulent. In cases where there is an expressed fiduciary relation, the court assumes the influence of the trustee over the beneficiary. But there are cases where undue influence may be urged as a reason for setting aside a transaction where there is no actual trust relation between the parties, and where the influence is not actually fraudulent in character. And in many cases the party exercising the influence does so without any fraudulent intent and perhaps does so unconsciously. In such cases things are done which he would not have done had the influence not been exercised. Frequently the relation of the parties is such that equity will assume that undue influence has been exercised and that therefore a transaction between the parties is constructively fraudulent. For example, suppose that a spitiual advisor becomes very closely associated with a person and



on account of his relation as spiritual advisor gets a great influence of the person. He may not be conscious that he is exercising such influence. He may not be conscious that he is guilty of fraud in inducing that person to deed or devise his property to the religious organization, but the court will regard it as presumptively fraudulent, unless a clear showing is made that there has been no over-reaching and that the party has been entirely free and untrammelled in his action.

Sometimes the relation of parent and child are such as to be in effect fiduciary. The parent is old and feeble and inclined to look to the son for guidance. The son is young and vigorous and in the prime of manhood. A transaction between the father and son under those circumstances, particularly if it results in the conveyance of property from the father to the son upon a small consideration, would be regarded by equity as constructively fraudulent. On the other hand if the parent was in the prime of life and the son just come of age and property was deeded from the son to the parent, the presumption may be the other way.

Very frequently you will find that a physician in dealing with his patient unconsciously exercises that influence which equity regards as undue, and if as a result of that influence, the patient deed or bequeaths valuable property to the physician, equity will regard the transaction as constructively fraudulent.

There is another example, that is, in case of an engaged couple just on the eve of marriage. And it is unfortunate for the majority of my audience that the presumption in such a case is in favor of the woman and against the man. Any conveyance by a woman to the man of her property on the eve of marriage is constructively fraudulent. The law presumes that the man under such circumstances has an influence over the woman which is undue, and that her good judgment is for the time being somewhat affected.

#### DICTATION

There are some cases where although no fiduciary relation exists the courts will assume the relation to be in effect fiduciary, and will regard transactions between the parties as constructively fraudulent. Where one party is so situated that his influence over another is undue (although not actively fraudulent), equity will regard the transaction between them as presumptively invalid.





The relation of physician and patient, of pastor and member of the church, the parental relation--any relation in fact out of which a commanding influence on the part of one party over the other naturally grows, are the relations that usually give rise to the proceedings.

75 N.Y. 91( Ill. Cases 309)  
 2 Chanc. App. 55( Ill. Cases 330)  
 96 Calif. 632  
 28 Pac. Rep. 785(Ill. Cases 328)  
 147 Ill. 370 (Ill. Cases 324)  
 35 N.E. 150  
 124 Pa. St. 406

I will now pass to the third division of constructive fraud as given by Lord Hardwicke.

#### DICTATION

The third class of constructive fraud embraces those cases wherein the transactions affects persons who are not parties thereto. Fraud may be presumed and a transaction will be regarded as constructively fraudulent where its effect is to prejudice inequitably the rights of third parties.

The case of a husband conveying property to his children on the eve of a second marriage in order to cut off the dower of the intended wife is constructively fraudulent. It is only set aside so far as her dower interest is concerned. It will remain as between the father and children, excepting that the property will be subject to the dower interest of the wife.

3 Del. Chanc. 99(Ill. Cases 350)

The most important cases are those that involve secret agreements with creditors in connection with compromises with creditors, whereby one creditor, under a secret agreement, is to be paid in full provided he will sign the compromise. Agreements of this kind are against public policy and are constructively fraudulent.

#### DICTATION

Another example is to be found where in a composition with creditors, one creditor gets security for a larger amount than another, in consideration of his signing or joining in the



compromise. A security of that kind cannot be enforced, not because the court has consideration for the debtor, but because a transaction of that kind is against the policy of the law.

82 N.Y. 393 (Ill. Cases 344)  
142 N.Y. 404 (Ill. Cases 346)

Another instance is the conveyance of property by a debtor with intent to defraud his creditors.

Pomeroy, vol. II, 968-973.  
Bispham, 240-248.

I have now discussed with sufficient fullness as I think the time permits the principal grounds of relief in equity. Other grounds will undoubtedly be discovered by you, but those I have discussed are the principal grounds of relief. We have now finished three of the divisions of the subject as it was outlined at the beginning of this course. You will remember that the subject was divided into four divisions, namely: I. Equitable Maxims, II, Equitable Titles, III Grounds of Relief in Equity or Equitable Rights, IV. Equitable Remedies. Some of the equitable remedies I have referred to already with sufficient fullness to preclude the necessity for a further consideration. I have spoken of the remedies of Cancellation, Rescission, Reformation and Reexecution and have spoken in a general way of Specific enforcement. There yet remains to be considered the remedies of Specific Performance, Injunction and Receivership.

Under the present arrangement I take simply the remedy of Injunction and Professor Bunker takes the remedies of specific Performance and Receivership.

Before I take up a discussion of the remedy of Injunction I wish to take up some special heads of Equity Jurisdiction that do not properly fall under any of the general heads that have been discussed.

#### SPECIAL HEADS OF EQUITY JURISDICTION.

##### Equitable Doctrine of Election.

This doctrine is of considerable practicable importance in connection with the Law of Wills, and also as affecting dower interest. Under the old system of equity jurisprudence the doctrine of election in other particulars was of more importance than it is to-day. I shall confine myself to a consideration of the doctrine as it is in use to-day.

An election in equity is the choice which a party is compelled to make between property that has been conferred upon him (usually by will) and the keeping of his own property which the testator has assumed in his will to transfer. The



For example, suppose A gives to B, by deed or will, property belonging to C, and by the same instrument gives property belonging to himself to C. Under such circumstances C would be put to his election. C would be obliged either to transfer his own property to B and take the property bestowed upon him by A, or refuse to take the property bestowed upon him by A, and keep his own property.

We must undoubtedly look to the Roman law for the origin of this doctrine. It was suggested by the Roman Law although there is nothing in the Roman law that is exactly equivalent. The Roman law upon this subject was different however in one marked respect, for a gift upon an erroneous supposition that the property belonged to the testator would be invalid. Such is not the case in this country at the present time.

#### DICTATION

Election in equity is the choice which a party is compelled to make between a gift or bequest that has been bestowed upon him and the keeping of some of his own property that the party making the gift has assumed to transfer to another.

The doctrine of election originated in two gifts, one of which the pretended donor has no power to make, there being an implied intention on the donor that one gift shall be operative only if the donee permit the other gift to be operative.

For a general discussion of the doctrine, see:

Pomeroy, I, Paras. 461-2.

Snell's Equity (Am. Ed.) 2012.

Bispham, Para. 295.

-----000-----

Nov. 17th, 1903.



## LECTURE XIV.

-----:~::~:-----

The doctrine of election in equity was probably borrowed from the Roman Law. There was a custom which came to be a rule of positive law among the Romans that when a person had been made the heir of another, that person would be required to fulfill all the conditions imposed in the will or to renounce the privileges of the will.

The foundation of the doctrine of election is to be found in the presumed intention of the testator. A party by will assumes to give property of another to a third party and in the same instrument confers a benefit upon the owner of the property upon the assumed condition that the owner of the property will transfer the property to the third person. To accept the benefits and decline the burdens would be to frustrate the intention of the donor.

## DICTATION

The foundation of the doctrine of election is found in the presumed intention of the donor. The presumption being that the donor confers the benefit under the will with the presumed condition or intention that all of the terms of the will shall be fulfilled.

Pomeroy, vol. I, 454  
 Snell's Equity 202  
 -----

Mr. Pomeroy does not altogether agree with the doctrine that the foundation or basis of the doctrine of election is to be found in the presumed intention of the donor. He claims that the real foundation of the doctrine is rather found in the maxim of equity that "He who seeks equity must do equity."

Election is of two kinds: (1) Express Election; (2) Implied Election. For example a testator may provide in his will that a legacy shall pass to a certain person upon condition that he convey a certain piece of property to another person named in the will. An election of that kind is an express election, and upon failure to convey in accordance with the stipulation of the will a forfeiture shall result. But such is not the result where the election grows out of an implied duty, for the person who fails to respond to that duty does not necessarily lose the entire benefit that is bestowed upon him, but only so much of it as will amount to compensation to the party who is disappointed by his failure to convey his property in accordance with the implied condition. The





refractory donee is entitled to such benefits of the will as is not necessary to compensate the disappointed party under the will by the failure to convey.

#### DICTATION

THERE ARE TWO KINDS OF ELECTION: (1) where the condition in the instrument is expressed. Here a failure to comply would result in a forfeiture. The other kind of condition in the instrument (2) is implied. Here a failure to respect the condition does not work a forfeiture or necessarily result in taking away from the refractory donee all benefit under the will.

76 Va. 839 (Ill. Cases 120).

-----

#### EFFECT AND SCOPE OF DOCTRINE OF ELECTION.

First I wish to suggest that whenever a party is put to an election there always two courses open to him. A gives to B property belonging to C and by the same instrument gives to C property belonging to himself. Now the two courses that are open are these: (1) C may elect to take under the instrument. If he does this he must obey the implied condition of the instrument. If he takes the benefit and neglects or refuses to convey, equity, at the suit of the party entitled to the benefit, can compel him to convey. (2) He may elect against the instrument. If he retains his own estate, does he forfeit the entire benefit conferred upon him by the instrument? Not necessarily. Of course he would forfeit the entire benefit if the value of the estates were exactly the same. But where he elects against the instrument he still takes the property that is will to him under the instrument, and he takes it by virtue of the instrument, for if he did not a forfeiture would take place, and there would be no way of compensating the other party whom the instrument is intended to benefit. The implied condition in the will makes it necessary for him to confirm the will, or else out of the testator's property given to him by the will make adequate compensation to the third person whom his choice has disappointed.

But if the value of the legacy is greater than the property which the testator assumes to dispose of, the party to whom it is given will generally elect to take under the instrument and to convey away his own property in accordance with the terms of the instrument. But sometimes for reasons of sentiment a party chooses to keep his own property. When he does this the devise or legacy vests in him exactly the same manner as if he had chosen to elect under the instrument, not absolutely, but as trustee for the benefit of the disappointed party to the extent of adequate compensation. The court in the language of the cases sequesters the property until compensation is given.



## DICTATION

In case of an election two courses are open(1) the party may elect under the instrument. In such a case he is bound to carry out the terms of the instrument and convey his own property in accordance with its terms and directions. If he accepts the benefits and refuses, a court of equity will compel him to convey. (2) The election may be against the instrument. If the condition is an implied one it will not under such circumstances work a forfeiture, but the refractory donee takes the title to the property for the purpose of enabling the court to award compensation to the disappointed party. Anything over and above full compensation remains the property of the refractory donee.

Law Rep. 3 Chan. Div. 688( Ill. Cases 128)

-----

The illustrations that I have thus far given are of the most simple form. But often the facts are complicated. In such cases the difficulty is not in requiring how the election and the rights of the parties shall be determined, but in deciding whether or not the doctrine of election should apply. We shall be assisted in our inquiry for an examination of certain fundamental principles.

## GENERAL PRINCIPLES.

The first of these that I desire to call your attention to is this: An election can never be necessary excepting where a party has affected to dispose of property which is not his own, and has also made a valid gift of his own property.

The intention to dispose of property belonging to another must appear upon the face of the instrument. You must find the intention within the four corners of the instrument. I do not mean by this statement to convey the impression that parol evidence cannot be resorted to at all in cases of this kind. You may show by parol evidence the situation of the parties, the relation of the parties, the condition of the property, anything in fact that will serve to put the court in the shoes of the testator at the time he executed the instrument. Parol evidence cannot be introduced for the purpose of showing the intention, but only for the purpose of showing the condition of the property, the relation of the parties and the incidental matters of that kind that tend to place the court in the position of the testator. The intention of the testator must be gathered from the instrument.

## DICTATION

## FUNDAMENTAL PRINCIPLES.

(1) There can be no election unless the party has affected to dispose of property that is not his own.

Law. Rep. 3 Eq. Cases 244

(2) The intention to dispose of property not his own must appear upon the face of the instrument. Parol evidence may be used for the purpose of showing the attitude of the parties and of the property--in a word the putting of the court



in the position of the testator. But not for the purpose of showing his intention in regard to the disposition of the others property.

41 Ark. 64( Ill. Cases 125)

Read and prepare for examination.

-----

In illustration of this first principle take the case of a husband devising lands free of his wife's dower. The husband has no power, generally, to give away his wife's dower. In England and in some of the states of this country the law in this respect has been changed by statute, but in this and most of the states of the union her dower interest is an interest that cannot be reached by any action on the part of her husband. The husband conveys land to a stranger and the terms of the conveyance is such that the right of the wife to have dower in the premises would be inconsistent with the grant. It is not expressly stated that the devise is to be clear and free from the wife's dower, but for example, the devise , but he says that the devise is to be free and clear of all claims, or that he may dispose of the property in a certain way, that he may dispose of the income in a certain way. The use and disposition of the income being so arranged that it would be impossible to carry out the terms of the will if the wife were to enforce her dower interest. In this same will property is devised to the wife, but the instrument does not state that it is to be in lieu of dower. In such a case the wife would be put to her election. She could not take both under the will and her dower interest. There is always a presumption in favor of the wife's dower and if her dower is taken away so that she is compelled to elect between the taking of the provision made for her in the will and her right of dower, it must appear upon the face of the instrument that the scheme of the will is entirely inconsistent with her right to claim dower. The condition that the wife be put to her election must be so clearly expressed as to overcome this presumption in favor of dower. This matter is very nicely put in the case of

104 N.Y. 125

where Andrews, J., in delivering the opinion of the court said: "There can be no controversy as to the general principles governing the question of election between dower and a provision for the widow in the will. Dower is favored. It is never excluded by a provision for a wife except by express words, or by necessary implication. Where there are no express words, there must be, upon the face of the will, a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears, without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions, and disturb the scheme of the testator as manifested by his will. The intention of the testator to put the widow to an election cannot be inferred from the extent of the provision, or because she is devisee under the will for life or in fee, or because it may



seem to the court that to permit the widow to claim both the provision and dower would be unjust as a family arrangement; or even because it may be inferred or believed, in view of all the circumstances, that if the attention of the testator had been drawn to the subject, he would have expressly excluded dower. To repeat the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility arising on the face of the will between a claim of dower and a claim to the benefit given by the will."

## DICTATION

There is a presumption in favor of dower that in the absence of statute must prevail unless it is overcome by the express or implied intention of the testator to be gathered from the language of the instrument, together with the fact that to allow dower would interfere with the scheme of the will. In order the the wife may be put to her election it must not only appear that the intention of the testator is that the provision of the will should be in lieu of dower, but also that the provision in the will is absolutely inconsistent with her claim of dower.

104 N.Y. 125( Ill. Cases 129)

Pomeroy Vol. I, 493

113 N.Y. 232.

It is a matter of no importance in a question of this kind whether or not the provision made for the wife in the will is at all adequate. It may be very much less in value than her dower interest. It may be entirely inadequate for her support. The wife may elect. If it is not an adequate provision for her support, she has the right to take her dower interest, because she cannot be deprived of it without her consent.

## DICTATION

It is a matter of no importance that the provision made for the wife in the will is not adequate.

-----;;;-----

Nov. 23rd, 1903.





## LECTURE XV.

---::---

You must now understand, I think, the general rule by which the widow's election in dower cases is to be governed. There are, however, certain special rules to which I must call your attention. By means of these special rules we can determine in most cases whether or not there is an inconsistency between the claim of dower interest by the widow and the receiving by her of the benefit provided for her in the will. There are, you see, certain situations that the courts have passed upon in regard to this matter where the rule has become a definite one, and it is well for us to have these special and definite rules in mind.

## SPECIAL RULES AS TO DOWER:

IF A TESTATOR SIMPLY DEVISES A PART OF HIS REAL ESTATE that is subject to dower to his widow, and gives the rest of his real estate to some one else, using language substantially the equivalent of that here used, there will be no case for election; the widow will not be compelled to elect. Where there is a simple devise of real estate to the widow and a simple giving of the rest of the real estate to someone else, the courts say that the provision of this kind is not inconsistent with the claim of the widow for both her dower interest and the provision made for her in the will.

Dictation.

(1) No election where there is simply a devise to the wife of a part of the real property and a devise to some other person of the remainder.

Pomeroy, I., par. 487 or 497.

7 Cow. 287

9 N. Y. 502-11.

-----

Here is another situation that the courts have passed upon, altho unfortunately they are not all agreed as to what is the right holding: Suppose that a man devises to his wife a life interest in all his real property, or devises the use of his real property to her so long as she may remain a widow. Under these circumstances is she put to an election as between that interest and her dower interest? It would seem that the holding of those two estates by the same person would be inconsistent, but you must remember this: that equity will always prevent a merger where the parties intend that no merger shall exist. And where a merger would work inequitably (according to the weight of authority, probably) the wife under such circumstances would not be put to an election; she would



be permitted (by virtue of the general presumption that I tried to explain to you) to claim both life estates.

You will naturally ask the question: HOW COULD SHE CLAIM BOTH? Of course, she cannot enjoy the dower interest so long as she is enjoying the conventional life interest given her by the will. But suppose that conventional interest proves irregular in some way, or suppose she forfeits the interest--then, of course, she could enjoy her legal estate. Or if the devise is to the wife so long as she may remain a widow, her estate would come to an end upon a subsequent marriage--her dower interest would then take effect.

THAT IS ACCORDING TO THE WEIGHT OF AUTHORITY. According to some courts, however--particularly the New Jersey courts--she is put to an election in such cases.

Dictation.

(2) According to the weight of authority, probably, a DEVISE OF A LIFE ESTATE in all of the testator's real property to the wife, or of an interest to LAST DURING HER WIDOWHOOD, would not be inconsistent with her claim of dower.

5 Hill 206 10 Paige Ch. 206  
Pomeroy, T., Para. 547.

Contra: Stark v. Hutton, Saxton (N. J. Eq.) 217.

Here is another situation that has been passed upon by the courts: property is DEVISED OR DEEDED TO TRUSTEES WITH POWER to sell. Is a devise of that kind inconsistent with the claim to dower on the part of the widow where there has been a pecuniary or other provision made for her in the will? It is held, I think without exception that the widow under such circumstances may claim dower AND the provision made for her in the will; that where the power that the trustees have is simply a power to sell, it is not inconsistent with the claim of dower on the part of the widow.

Dictation.

(3) A DEVISE TO TRUSTEES TO SELL simply, a provision having been made in the will for the wife, is not inconsistent with the widow's claim for dower in the same land.

3 Hare (Eng. Ch.) 310 3 Paige Ch. 325  
2 Johns. Ch. 448.

(4) WHERE, HOWEVER, THE TRUSTEES HAVE DUTIES TO PERFORM that call for full control and management of the legal title, a provision having been made for the wife in the will SHE IS PUT TO HER ELECTION. And the same is true, generally, wherever special directions have been given to a devisee (whether as trustee or not) as to the use and management of property.

Goodfellow v. Goodfellow, 15 Bev. 376  
Thompson v. Burro, L. J. 18 Eq. 328. 22.  
4 Rev. 103. -----



STATUTORY MODIFICATIONS OF ELECTION.--In order to prevent any misunderstanding I should now suggest that dower and the doctrine of election, so far as connected therewith, have in a few of the states been considerably changed by statute. And now right here I want to say to you that if you are wise young men you will GO TO YOUR STATUTES and consult them upon this question of election in dower cases. We will take the Michigan statute as an example. Now remember first that I have said to you that in every case where a husband makes a provision for the wife in his will it is presumed to be IN ADDITION to the dower interest, and in order that the wife may be put to her election it must appear by unequivocal language that he intends the provision to be in LIEU OF DOWER and not in addition to dower. In a few of the states this presumption has been exactly changed by statute. The Michigan statute reads: 'If any lands be devised to a woman, or other provision be made for her in the will of her husband, she shall make her election whether she will take the lands so devised or the provision so made, or whether she will be endowed of the lands of her husband; but she shall not be entitled to both unless it plainly appears by the will to have been so intended by the testator.' That just changes the presumption right around.

Dictation.

In several of the states you will find a STATUTORY PROVISION THAT CHANGES RADICALLY THE EQUITABLE PRESUMPTION that the provision for the widow is intended to be in addition to dower. These statutes provide that a devise or bequest to the wife shall be deemed to be in lieu of dower unless it expressly appears upon the face of the will that the husband intended the wife to take both.

Mich. Comp. L. '97, Para. 8935-6;

Reed v. Dickeman, 29 Pick. 146; 12 Pick 145;

(Ill. Cases 121).

Pomeroy, Vol. I., 494.

-----

There is another matter in connection with this statutory change that you should have in mind. These statutes, as a rule, provide a certain time within which the widow must elect whether she will take the provision made for her in the will or whether she will take her dower, and they usually provide that if she does not proceed within the time specified by the statute to have her dower assigned or to take measures for the recovery of her dower, then she will be deemed to have elected the provision made for her in the will. If she takes no steps at all for having her dower assigned, then she is, under the statute, presumed to have elected in favor of the will.

THE MICHIGAN STATUTE reads: 'When a widow shall be entitled to an election under either of the two last preceding sections, she shall be deemed to have elected to take such jointure, devise or other provision unless, WITHIN ONE YEAR after



the death of her husband, she shall commence proceedings for the assignment or recovery of her dower. Now in this state this election of the widow is usually made, not by any formal proceedings for the assignment of the dower (because in most cases dower is assigned without any formal proceedings, at least of an adversary character), but by indicating in writing (no particular form need be followed) in the probate court that she elects to take her dower, or that she elects to take the provision under the will. Now if she does not make this election within the time provided by the statute, the result is liable to be serious. So far as I have observed, the question has not been passed upon in this state, but it has been passed upon in a recent case in New York, where the statute is exactly the same as ours; and it is held in this case that this statute is a statute of limitation and that if the widow fails to make her election by proceeding to get her dower within the year fixed by statute, she is cut off from the right to do so in the future. In that case the widow was deceived as to the value of the property--not purposely deceived--by some representations innocently made to her by the executor, and the value of the estate was not known to her until after the year had elapsed, and then she decided to change and take her dower interest and attempted to make her election. But the court said, 'No, this is a statute of limitation, and you are bound by the letter of the statute.'

#### Dictation

Under the statutes in several of the states the equity presumption in regard to the intention of the testator has been changed and a provision for the wife is held to be in lieu of dower unless a contrary intention plainly appears upon the face of the will.

Michigan C. L., Para. 8935

Under these statutes the widow **MUST TAKE HER ELECTION WITHIN THE TIME PROVIDED**; otherwise she will be deemed to have elected the provision in the will. The statute is **ONE OF LIMITATION** and will be strictly construed.

Aiken v. Kellogg, 119 N. Y. 441.

Now, in the absence of a statutory provision requiring the widow to elect within a certain time specified the **WIDOW HAS A REASONABLE TIME** within which to make her election. What is a reasonable time, of course, depends upon the circumstances of the case. Three, five, or even sixteen years have been held to be a reasonable time under the circumstances. These were all English cases; I have not found any American cases in which the question has been passed upon. As a matter of fact, in most of the states, even where the fundamental doctrine has not been changed by statute, you will find a statutory limitation of the time within which the widow may elect, and that statute must be strictly followed.





## Dictation.

IN THE ABSENCE OF A STATUTORY PROVISION upon the subject the widow has a reasonable time within which to elect, and what is a reasonable time would depend, of course, upon the circumstances of the case.

Wake v. Wake, 1 Ves. 333;

Reynard v. Spence, 1 Bev. 103;

30 Bev. 235.

But in the absence of statute the party HAVING THE RIGHT TO COMPEL AN ELECTION is not cut off by delay as a rule, in the absence of intervening rights of third parties.

Pomeroy, I., Para. 513.

-----000-----

November 24, 1903.



## LECTURE XVII.

-----:---:-----

At the close of the last lecture I was calling your attention to the equitable doctrine of election in connection with dower cases. I had said that in the absence of any statutory provision, the presumption is that if a husband makes a provision for his wife in his will it is his intention that she shall have that provision in addition to her dower interest in the property, and that that presumption can only be overcome by its appearing that his intention was the opposite and that any other construction would be contrary to the real scheme of the will. I also said that in a few of the states statutory changes had been made. Such statutory provisions provide that where a provision is made in a husband's will for the widow, she is bound to elect whether she shall elect to take under the will or to take what the statute allows her, but she cannot take both unless it plainly appears upon the face of the will to have been the intention of the husband that she should have both. The presumption is just the contrary to the presumption where no statute exists. I also said that under these statutes the widow must make her election within the time provided, otherwise she will be deemed to have elected the provision in the will. The statute is one of limitation and must be strictly construed. In the absence of a statutory provision requiring the widow to elect within a certain time, the widow has a reasonable time within which to make her election. What is a reasonable time, of course as in all other cases, depends upon the circumstances of each particular case. What is a reasonable time depends upon the circumstances surrounding the estate and the parties interested in the estate. In the absence of statute the party having the right to compel an election is not as a rule cut off by delay where the rights of third parties have not intervened.

In these dower cases the interest that is affected by the will of the husband is a partial one so far as the husband is concerned. When he presumes to convey away by will property in which his wife has a dower interest he is dealing with property in which he has an interest and in which his wife has an interest. In such cases where the testator has only a partial interest in the land and describes the property in general terms, he will be held to have intended to convey only his own partial interest. In all cases be they dower cases or other sort the courts lean strongly in favor of the interpretation that will confine the disposition to the interest of the donor simply. The presumption is that he intends to dispose only of that part of the property which is his own. If a person has a partial interest in the property and he uses general language of description, the court under such circumstances would hold that no case of election would arise, but



if he uses language indicating that it is his intention to part with not only his interest, but to convey away the interest of the other party by the use of language sufficient to convey that interest, then a special case of election arises.

Frequently cases of this kind where the party's interest is in remainder or reversion dependent upon a life estate. The party simply uses general language in describing the property conveyed, no case of election will arise, but if he specifically describes the property then a case of election will arise. If the testator owns a reversionary interest in the property or an interest by way of remainder, and uses general terms in describing the property--such as, 'all of the following described property, to-wit, '--not saying that his interest is in remainder or reversion, under those circumstances, his interest being a partial one, he will be presumed to have intended to pass by the will simply his partial interest; and in order to include under the terms of the instrument the life estate outstanding, an intention so to do would have to appear by strong and unequivocal language to be found within the four corners of the instrument.

#### DICTATION

In case the interest of the testator in the property devised is only a partial one, and he makes use of general language of description, such as, 'all my estate, or 'all my interest', he will be held to have intended to include in the gift only his partial interest. Under such circumstances an election would not be necessary, but if he describes the property specifically in which he has a partial interest making provision for the other party interested in the will, then a case of election will arise.

Pomeroy Vol. I, 474, 488-89  
76 Va. 839 (Ill. Cases 120)  
18 Ill. 17 (Ill. Cases 126)

Where it appears that the party intends to dispose of the property mentioned in the will only in case he has the title to it, and in the instrument he makes a provision for the person who is the owner of the property, no case of election will arise. We have a case of election, however, wherever a person disposes of property in his will that he supposes he owns, altho he may be mistaken, and conveys a benefit upon the person who is the real owner of it.

Pomeroy vol. I, 475  
5 Sim. 525



Sometimes we meet with this case: a testator devises property subject to incumbrances, but makes no provision for the discharge of the incumbrances, and by the same instrument makes a devise to the party holding the incumbrance or incumbrances, under such circumstances is the party held in the incumbrances put to his election? The courts hold that where nothing is said about the discharge of the incumbrances, but the devise is simply of the land without reference to the incumbrances, then no case of election arises, but if there is anything in the instrument to indicate that the testator intended that the incumbrance should be discharged, then the mortgagee will be put to his election.

#### DICTATION

o election where property that is incumbered is devised the mortgagee being made legatee or devisee also unless provision is made in the will for the discharge of the incumbrance.

1 Yes. 514

1 Law Rep. Equity Cases, 415

There is another situation that you will sometimes meet with that I wish to discuss, then I will leave the discussion of the doctrine election in equity, and it is this: let us suppose a man owns property in two different states, for instance, the state of Michigan and the state of Ohio. The property consists of both realty and personalty. He makes a will by which he devises realty to a stranger and bequeaths the personalty to his son. The will is not so executed that it will pass title to realty in the neighboring state, (As sometimes happens where the testator's state requires only two witnesses and the other state requires three to a will. It is always safer to have three witnesses to a will altho your own state only requires two.) Under such circumstances do we have a case of election? Will the heir-at-law be compelled to elect whether he will take the bequest under the will or take as heir. The conclusions of the courts are not altogether satisfactory, but I think that this rule may be worked out of the decisions: Where the language of the testator is general in character, where he does not refer specifically and directly to the lands situate in the other state, under those circumstances he will not be put to his election. But if he refers to the lands specifically he will be put to his election.

#### DICTATION

Where lands and personalty of a testator are situate in different states, and land in a neighboring state is in terms devised to a stranger, the domestic property being left to his heir-at-law, the will not being executed in such a way as to pass realty in the neighboring state, then we have a case of





election provided the description of the neighboring real property is specific.

Van Dike's Appeal, 60 Pa. st. 481

We come now to a consideration of the  
DOCTRINE OF SATISFACTION

which is a doctrine closely allied to that of election. The underlying principal of each being the same maxim of equity "that he who seeks equity must do equity." In many cases of satisfaction an election must actually take place. Satisfaction as the term is used in equity is a substitution for the thing covenanted to be done. Something is given with an intent, either express or implied on the part of the donor, that it shall be received in extinction of some prior obligation in favor of the donee. Suppose A is indebted to B, and A makes a will and in that will makes a bequest to B that is equal to or greater than the indebtedness. He does not say that B is to receive the bequest in lieu of the indebtedness. Can you under such circumstances work an intention out of the instrument on the part of the testator to the effect that the bequest is to be regarded as a substitution for the debt? The general rule is that whenever a person is indebted to another, and in his will he leave a bequest to that party equal to or greater than the indebtedness, a substitution will take place in equity, and the devisee will be required to elect whether he will take the provision in the will or will enforce his debt. That is the general rule which is subject to several exceptions which I will discuss in due time.

#### DIVISION

Satisfaction is a substitution for a thing covenanted to be done. It is an equity doctrine, and only courts of equity can enforce satisfaction, and this doctrine is frequently and perhaps usually enforced by the party being compelled to elect between the enforcement of his obligation and the receiving of the benefit conferred.

Division of Satisfaction.

- (1) Satisfaction of debts by legacies. The general rule is that if a person being indebted to another leaves to him in his will a sum of money equal to or greater than the indebtedness, altho he does this without mentioning the indebtedness in the will, this provision will be regarded as a satisfaction of the debt.
- (2) Satisfaction of legacies by subsequent legacies.
- (3) Satisfaction of portions by legacies.
- (4) Satisfaction of legacies by portions

-----oOo-----

Dec. 1st, 1903.



## LECTURE XVII

THE PRESUMPTION OF AN INTENDED SATISFACTION

I have

I said to you yesterday morning that satisfaction is the substitution for the thing covenanted. And I had given to you the general rule which is as follows: that if a person is indebted to another and leaves that other in his will a sum of money equal to or greater than the indebtedness, even tho he does this without mentioning the indebtedness, a presumption of an intended satisfaction of the debt will arise.

While this presumption undoubtedly exists and is recognized by the courts, it is not a presumption that is favored in equity. The courts lean strongly against it, and have adopted numerous exceptions to the rule.

Strong v. Williams, 12 Mass. 391 (Ill. Cases 391)

## EXCEPTIONS TO THE GENERAL RULE:

(1) WHERE THE LEGACY IS LESS THAN THE DEBT.

Parker v. Coburn, 10 Allen 82

(2) Rule does not apply where DEBT WAS CONTRACTED SUBSEQUENTLY TO THE MAKING OF THE WILL.

Horner's Exors. v. McGowan, 31 Pa. St. 109

(3) No satisfaction where LEGACY AND DEBT ARE PAYABLE AT DIFFERENT TIMES.

Horner's Exors. v. McGowan, supra

(4) WHERE LEGACY IS CONTINGENT OR UNCERTAIN, the presumption of an intended satisfaction does not arise.

(5) WHERE THE DEBT IS UNCERTAIN, as in case of a running account, no presumption of an intended satisfaction.

The rules which I have discussed are found in

Pomeroy vol. I, para. 534.

The bequest may be in the form of moneys or it may be in the form of goods or chattels. Anything that is personal in its nature comes under the head of bequests. You cannot satisfy a debt by handing over to the creditor some other kind of property. You can only give him what is actual legal tender. You cannot put him to an election. The general rule does not apply where the bequest is something besides money. The value of the chattel may be much greater than the value of the debt. Now a debt is usually in the form of a pecuniary liability. The party is obligated, by the relation of debtor and creditor, to pay to the creditor a certain sum of money. Of course a debt, generally speaking, may exist where one party has to pay another in a certain commodity. Now if the debt is in the usual form—an obligation to pay a certain sum of money—a legacy in the will specific in its nature, by which a particular thing, a particular piece of property is conveyed to the creditor, will not satisfy the debt. E.g., an indebtedness exists in the form of a bond for \$500 made by another to



# DECLARATION

6th EXCEPTION: Rule does not apply where the provision in the will is a bequest of something different from the obligation.

This exception you will find discussed in  
the Case Book page 135.  
49 N.J. Eq. 106; 27 At. Rep. 799.

-----

It frequently happens that a testator states some motive that has induced him to make the provision in the will. The presumption of the general rule does not apply here unless the motive be a statement of an intended satisfaction.

# DECLARATION

7th EXCEPTION: Wherever a motive is expressed other than an intention to satisfy the debt, general rule does not apply.  
Pomeroy, vol. I, para. 553.

Very frequently a will contains an express direction that all debts and legacies be paid. Sometimes the form of direction is that all debts be paid. Now the courts have held with considerable unanimity that where there is an expression in the will directing that all debts and legacies be paid, a presumption of an intended satisfaction of a debt by a legacy will not arise. And some courts have gone so far as to hold that where the provision in the will is simply that all debts be paid the presumption of intended satisfaction shall not arise. You can see what the reasoning of the court must be. If the testator has directed that all debts and legacies be paid he cannot reasonably be held to have intended that one debt should not be paid because a legacy is provided for the creditor. Now the way the courts have tried to escape from the effects of the general rule will be apparent from my reference to the next and eighth exception.

# DECLARATION

8th EXCEPTION: The general rule will not apply where there is an express provision in the will that all debts and legacies shall be paid.

12 Mass. 391 (Ill. Cases 135)  
49 N.J. (N.J.) 106 (Ill. Cases 135)

-----

An agreement is entered into between two parties by which one agrees to serve the other for the consideration that



the one being served shall leave a bequest in his will. Under such circumstances if services are rendered the obligation exists, and if it is made in the will it is good. It arises out of the express agreement of the parties, but suppose the agreement is a general one that A will work for B during the remainder of B's life, provided B will make him his heir, there are under these circumstances certain equitable interests in this property. If a person agrees to perform services and to be compensated by a provision in a will in his favor and such provision is made, it will if reasonable be regarded as a satisfaction. A creditor in such a case will not even have an election, for he has agreed to look to the testamentary provision alone for his compensation.

#### SATISFACTION

The doctrine of satisfaction applies frequently where a party had agreed to compensate another for services performed by a provision in the will. If the party receiving these services makes the provision agreed upon, it will be deemed to be a satisfaction; if the agreement is that the provision shall be a reasonable one then of course the court will decree it to be a satisfaction.

64 Mich. 1

13 Johns. 379

Pomeroy vol. I, 538

If the provision in the will is not made, then the party rendering the service is entitled to reasonable compensation as against the estate of the deceased.

Now in the cases thus far mentioned, I have had in mind this state of facts: that the parties are under no obligations to each other that grow out of family ties and responsibilities. But where such relations exist the rules are the same as in other cases. E.g., if a father owes a debt to a child and leaves a legacy to the child, the case will be governed by the rules I have given you. There is a difference however when we come to the subject of satisfaction of a legacy by a portion or the satisfaction of a portion by a legacy.

Sometimes it happens that a creditor gives a legacy to his debtor unaccompanied by any language showing an intent on his part to release or discharge the debt. The rule is that this does not ordinarily operate as a satisfaction or discharge of the debt; there is no intention that he intends the legacy so to operate. Of course the presumption might be such that a presumption would arise, and it might appear on the face of the instrument that the party so intends, and in such a case it would operate as a discharge of the debt. But





ordinarily the effect of such a legacy would be to operate as an equitable set-off in code states. But in the common law states you could not put it in as a defense to a legal action; you would have to go on to the equity side of the court, and set up the facts and get it allowed as an equitable set-off to the legal claim.

#### ELECTION

The doctrine of SATISFACTION IS ESSENTIALLY AN EQUITABLE doctrine. In a case where there is a presumption of an intention to create a satisfaction exists--as where it appears that the debtor intended a legacy--the creditor may be compelled to elect, upon a bill filed by the executor asking for such an election.

The legacy cannot be interposed as a defense to an action at law upon the debt until the election has been made. sometimes a provision for a legacy may be interposed as an equitable defense where law and equity are administered by the same tribunal and in the same action.

Stagg v. Beekman, 2 Ndw. Chanc. 91  
 Pomeroy, I, para. 545  
 Hobart v. Stone, 10 Pick. 215

-----000-----

Dec. 1st, 1903.



## LECTURE XVIII.

-----o9o-----

This morning I will take up the subject of:

## \* II. SATISFACTION OF LEGACIES BY SUBSEQUENT LEGACIES.

I wish to suggest (1) Where a legacy of quantity is given twice in the same instrument to the same person, the second gift will as a rule be held to be substitutionary and in satisfaction of the first. Thus where a testator gave to Mary Cook wife of John Cook 500, and afterwards in the same will 500 to his cousin Mary Cook, the court held that she was entitled to only one legacy of 500.

## DICTATION

II. Where a legacy of quantity is given twice in the same instrument to the same person, the second gift will be held to be substitutionary and in satisfaction of the first. Small items of difference will not prevent the application of this principle.

We have a case in the Case Book upon this phase of the subject.

10 Johns 156( Ill. Cases 137)

-----

Here is a qualification of the rule: But where the testator in different instruments gives legacies of quantity simply to the same person and uses no language showing a different intent, the second legacy will be held to be cumulative and not in satisfaction of the prior legacy. Under such circumstances the presumption arises that the testator intended the legatee to receive both gifts, and it makes no difference whether the second gift is exactly equal to or greater or less than the first

## DICTATION

Where the testator in two testamentary instruments gives legacies of quantity to the same legatee simply without using any words explaining his motive, under such circumstances the court will hold that he intended a double gift, and there will be no resumption of satisfaction.

But where in these two instruments he gives legacies the same amount in each and expresses in connection with the gift the motive and the motives are the same, under those circumstances the court will hold that the double coincidence of same amount and same motive indicate an intention on his part that the second legacy is substitutionary and not in satisfaction of the first.



But if the testator gives legacies of quantity simply to the same legatee in different instruments, the second legacy will be held to be cumulative and not in satisfaction of the first. But if a motive is expressed and in both instruments we find the same motive, the court will raise the presumption of an intended satisfaction. This presumption will not be raised if in either instrument there is no motive expressed although the amounts be the same, nor will it be raised if the same motive is expressed in both instruments and the sums be different.

5 Maddock Chanc. 351

53 N.H. 191

-----

The term 'different instruments' refers to different wills, or to a will or to a codicil thereto. A codicil is regarded by the courts as a different instrument so far as this principle is concerned.

#### DICTATION

There is never a satisfaction where the amounts of the legacies are different, nor where different motives are expressed.

17 Q St. 597( Ill. cases 139)

-----

It is a matter of some importance to know to what extent parol evidence is admissible to show the intent of the testator. Parol evidence is not, as a general rule, admissible to import to a will an intention different from that which appears upon the face of it. But it may be used to show the situation of the parties, the situation of the property, and the condition of the property, to such an extent as will put the court in the place that the testator occupied when the will was made. But it may go somewhat farther in the case that we are considering. In general, parol evidence is admissible in these cases where the effect of the evidence will be to confirm the will in the terms in which it is written wherever a presumption arises against the strict wording of the will. You may introduce parol evidence to show that it was the intention of the testator that both legacies should pass to the legatee. But where the effect of parol evidence will be to contradict and change the terms of the instrument it will not be admissible.

#### DICTATION

Parol evidence admissible: (1) To show the general situation of the property and the relation of the parties; (2) where the effect of parol evidence will be to confirm the terms of the will, as where there is a presumption against double legacies, parol evidence may be introduced to show



that the testator intended that both legacies should take effect; (3) It cannot be used where its effect will be to contradict the terms of the will.

Pomeroy, Vol. I, 552.  
5 Macleod Chanc. 351  
4 Ware (Ing. Cir.) 213

-----

I will next consider:

**SATISFACTION OF PORTIONS BY LEGACIES** and ademption of legacies by portions. A portion is a provision made for a party either by way of a present or will. It may be in the form of a marriage settlement, or it may be in the form of an agreement to transfer some thing to another party in the future. It may be in the form of a trust for the benefit of that other party. It is a pecuniary provision of some sort. An ademption is where the testator does something that the court will substitute for a legacy that is provided for in the will. It is in satisfaction of the legacy by something that the testator does outside and independent of the will. It is the extinction or withholding of a legacy in consequence of some act of the testator, which, though not directly a renunciation of the bequest, is considered in law as equivalent thereto, or indicative of an intention to revoke. In regard to portions the general doctrine is: that there is a presumption against double portions whenever the relation between the parties is that of parent and child, or wherever the donor stands in loco parentis to the donee. But no such presumption exists where the parties are strangers. For example, where a parent or other person standing in loco parentis bequeaths a legacy to a child and afterwards, in his lifetime, gives a portion or makes a provision for the same child or grandchild without expressing it to be in lieu of the legacy, it will in general be deemed to be a satisfaction or ademption of the legacy. This upon the ground that the legacy is considered to be a portion, and if the testator afterwards advances the same sum upon the child's marriage or any other occasion- he does it in lieu of the original portion. The relation between the testator and legatee creates a presumption of fact that the advancement was intended in the nature of payment and was so intended.

#### ADemption

**SATISFACTION OF PORTIONS BY LEGACIES AND OF LEGACIES BY PORTIONS.** There is a presumption against double portions whenever the relation between the parties is that of parent and child, or whenever the donor stands in the relation of parent to the donee. But no such presumption exists where the parties are strangers.

16 N.H. 2.  
19 N.H. 111. (Cutter 113)





You will see from a reading of this case that the Georgia Judge rather fretted under the road marked out to him by the precedents that establish this rule that where a father makes a provision in his will for his child and subsequently makes an advancement for the child that such advancement must be presumed to be an intended satisfaction of the provision in the will. It is a rule that some courts have held to be harsh and unnatural, and which this Georgia court evidently so considers.

118 Ind. 147

20 N.E. 733 (Ill. Cases 143)

5 Sneed 229 ( Ill. Cases 148)

-----

In cases of the kind discussed under the last general head an illegal or illegitimate child is regarded as a stranger, so that the illegitimate child is in a better position than the legitimate child. This rule has been criticized as harsh and unreasonable, but it is generally upheld at the present time by English and American courts. But the natural child may be put in the same position that the legitimate child occupies if the putative father assumes toward him the position known as 'in loco parentis.'

RE

DICTATION

The same presumption exists where the relation is that known to the law as 'in loco parentis.'

-----

Whether that relation exists is a question of fact which may be shown by parcel evidence. In order that this relation may arise it is not necessary that the parties live together under the same roof; it is not necessary that there be any official recognition, nor is a legal adoption necessary, but if the facts show that the donor intended to provide for the dependent and to look after him as a parent would look after a child, the court may assume that this relation known as 'in loco parentis' has been raised.

The leaning of the court in case of the satisfaction of a portion by a legacy or a legacy by a portion is in favor of the presumption where the relation of parent and child exists. In the latter case the presumption of satisfaction will not be repelled by slight circumstances of difference between advancement and portion.

In case of satisfaction of debt by a legacy the presumption that arises is one that the courts lean against. They consider that it is an unnatural and an unusual presumption.

DICTATION

Courts lean in favor of the presumption of an intended satisfaction where this relation of parent and child exists.



House of Lords Cases 131.

In this case the Lord Chancellor in delivering the opinion of the court said:

" Before I consider the authorities as applicable to the facts of this case, I think it expedient to throw out all the cases which have been cited in which questions have arisen as to the legacies being or not being held to be a satisfaction of a debt; for however similar the two cases may at first sight appear to be, the rules of equity as applicable to each are absolutely opposed the one to the other. Equity leans against legacies being taken in satisfaction of debt, but leans in favor of a provision by will being in satisfaction of a portion by contract, feeling the great improbability of a parent intending a double portion for one child to the prejudice generally, as in this case, of the other children. In the case of a debt, therefore, circumstances of small difference between the debt and the legacy are held to negative any presumption of satisfaction; whereas in the case of a portion, small circumstances are disregarded. So in case of a debt, a smaller legacy is not held to be in satisfaction of part of a larger debt; but in the case of portions it may be satisfaction pro tanto. It has been decided that in the case of a debt a gift of the whole or part of the residue cannot be considered as satisfaction, because it is said that the amount being uncertain it may prove to be less than the debt.

In considering whether this rule applies to portions, which is the real question in the case, the reason of the rule as applicable to debts must not be lost sight of; because as a portion may be satisfied pro tanto by a smaller legacy, the reason given for the rule as applicable to debts cannot apply as to portions. And, on the contrary, if the residue must be supposed to have been considered by the testator as of some value, it would appear upon principle that it ought to be considered as satisfied altogether or pro tanto according to the amount. For why should £1000 named as residue not have the same effect upon a larger portion as £1000 may as a money legacy?"

## DICTATION

It is not necessary in order that the doctrine of satisfaction apply that the amount given by will and subsequent legacy be the same.

Pomeroy Vol. I, 557

-----oOo-----

Dec. 9th, 1903.



## EFFECT OF XIX.

----000----

By reason of the fact that equity favors the presumption of an intended satisfaction of a legacy by an advancement where the parental relation exists, it follows: (1) That it is not necessary that the amount given by the will and the subsequent advancement be the same. The satisfaction will be complete if the amount is the same or greater; it will be pro tanto if the amount is less.

Pomeroy vol. I, para. 557  
5 Milne & Craig, 359

(2) The presumption of satisfaction is not overcome by the fact that conditions and limitations attached to the subsequent provision are somewhat different from those attached to the legacy.

3 Clark & Find. 146  
34 Bevan 19

(3) If the legacy is uncertain in amount, the subsequent advancement of a definite sum will be satisfaction in full or in part according to the amount of the legacy when the will becomes operative.

This view was not always the law, but it is now the general doctrine. The reasoning advanced by those who held to a different view was that the legacy must be in the nature of a portion whenever it is satisfied by a subsequent portion or advancement; that if it is indefinite in amount it cannot be regarded as a portion.

(4) An advancement made to a daughter upon her marriage will satisfy a previous legacy; so also if the advancement is made to the daughter and her husband, and possibly if made to the husband alone.

14 Pick. 516  
3 Ware 509  
Law Rep., 4 Eq. Cases 517

If a testator makes a provision in his will in favor of a child or a stranger, and subsequently during life, pays money to the beneficiary, who in accepting it acknowledges same to be in discharge of the prior provision in the will, then the provision will be satisfaction either in whole or in part as the case may be.

If money is paid by a parent to a child it will not as a rule be regarded as in satisfaction of a legacy subsequently given. The rule is different however where a receipt of money has been acknowledged by the child as satisfaction.

It has been held that ~~several~~ payment of different sums at different times by the parent to the child for whom a legacy has been provided in a will will not be regarded as satisfaction;



they will not be added together for the purpose of producing a satisfaction. Otherwise if the child acknowledges payment of money to be in satisfaction of a legacy already provided in his father's will, or to be in satisfaction of legacies that his parent may provide in the future.

#### DICTATION

Small sums of money advanced by a parent to child from time to time will not, as a rule, be regarded as satisfaction of a previous legacy, or of a subsequent legacy. The conclusion, however, must be different in the case of an agreement by the child that the money advanced shall be a satisfaction.

Pomeroy, vol. I, para. 560-4

10 Watts 54

-----

A legacy that has been satisfied by an advancement under this doctrine may be revived by a codicil attached to the will. An express reference to a legacy in the codicil that has been satisfied treating the legacy as still in force would operate as a revival. But the reference to the legacy must be express. The codicil that simply affirms the provisions made in the preceding will will not be regarded as giving new life to the legacy that has already been satisfied by an advancement. The reference must be a specific one in order that the codicil shall become operative.

#### DICTATION

The legacy that has been satisfied by advancements may be revived by a codicil, if special reference is made in the codicil to the legacy, but not otherwise.

Roper on Legacies, star page, 346

Pomeroy, Vol. para. 561

In the main the propositions that I have given you thus far under this subdivision of the subject apply both where there is a legacy followed by an advancement and where there is a portion followed by a legacy. But here is a qualification that I wish you to bear in mind: THE PRESUMPTION OF AN IMPLIED SATISFACTION IS LESS STRONG WHEN THE SETTLEMENT OR AGREEMENT FOR A PORTION PRECEDES the will than when the will precedes the settlement. If a man makes a provision for a legacy in his will, the whole matter is under his control until the will becomes operative by his death. He may strike out the legacy entirely or he may satisfy it by an advancement, and he may do this without consulting or obtaining the consent of the party for whose benefit the legacy was introduced in the will. But where there is a settlement or an agreement to make a settlement, there is an obligation resting upon the donor and an interest





vested in the donee. There is a contract right which the testator is bound to recognize.

#### DICTATION

While a presumption of an intended satisfaction exists in case of a legacy follows an agreement for a settlement the same as it does where the settlement follows the legacy, yet in the former case the presumption is not so strong as in the latter for the reason that there is a contractual obligation from which the testator cannot escape without the consent of the party for whose benefit it has been made. While such a presumption is recognized and enforced it will always rest in the courts giving to the donee the right of election.

2 Law.R. Ch. Cases 504  
Pomeroy, Vol. I, para. 565-8.  
Snell's Principles of Equity, 242-7.  
-----

THE NEXT QUIZ WILL BE UPON THE SUBJECT OF SATISFACTION  
AND THE CASES IN THE CASE BOOK UPON THAT  
SUBJECT.

#### EQUITABLE ESTOPPEL.

The subject which I will now take up is a subject of great practical importance on both the law and equity sides of the court. The doctrine of equitable estoppel originated in equity, altho at the present time it is very largely and almost universally recognized in courts of law. This matter of equitable estoppel almost always comes up upon the admissibility of evidence upon the trial of actions at law, and the discussion of the effect of evidence in equity cases before the court. But to regard the rule of estoppel as a branch of Evidence is misleading. The law of evidence is a branch of the law of procedure, but the doctrine of equitable estoppel extends further than this; it is the source of property rights, not merely the means by which those rights may be shown. Out of this doctrine of equitable estoppel grows and arises titles and contract obligations that both equity and law will protect and enforce.

Equitable estoppel is sometimes spoken of as estoppel in pais. The expression is liable to mislead and tend to confusion. Estoppel in pais should be used to describe certain legal estoppels, the broader term 'equitable estoppel' should be applied to describe the estoppel by conduct, that is applied both in law and equity.

It is difficult to give a comprehensive definition of equitable estoppel, but the following definition is perhaps as good a one as can be found for the reason that it regards equitable estoppel as something more than a branch of the law of evidence: Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is precluded from asserting



rights which he might otherwise have asserted as against one who has in good faith relied upon his conduct and claimed his conduct accordingly. By this means rights and titles may be lost and gained.

The essence of the definition is that if a party has been misled by the conduct of another in such a way as to operate to his prejudice if the latter is allowed to repudiate his acts, then such repudiation will not be allowed. The definition recognizes that primary rights are lost, and primary rights may be gained, by the estoppel.

#### DICTATION

The doctrine of equitable estoppel originated in equity, although at the present time, it is very largely, if not universally recognized in courts of law. It is essentially estoppel by conduct, the word conduct being used in its most comprehensive sense.

#### DEFINITION:

Equitable estoppel is the effect of the voluntary conduct of a party whereby he is precluded from asserting rights which he might otherwise have asserted as against a party who has been misled by his conduct.

Equitable estoppel has been regarded as a branch of the Law of Evidence, but as this definition indicates the doctrine of estoppel is the source of property rights and not simply a matter of evidence.

Dec. 14th, 1903.



LECTURE XX.

-----oOo-----

At the last lecture I had called your attention to estoppels in a general way. The doctrine of equitable estoppel is essentially an equitable one; it originated in courts of equity, although equitable estoppels are now recognized at law as well as in equity. There are however, certain estoppels, as estoppels by deed, estoppels in pais and estoppels by acquiescence, etc., which do not properly fall within the subject of equitable estoppels unless they reach over into this branch of estoppel by conduct. One of the division of the estoppels at common law is an estoppel in pais, which I shall refer to in this connection for the purpose of suggesting to you that you must be careful to distinguish between the common law estoppels in pais and this equitable estoppel by conduct. Estoppel in pais arose out of the conduct of the parties, but its essential characteristics are very different from equitable estoppel. We sometimes find that text writers use the terms indiscriminately. That is confusing and misleading. This equitable estoppel is the origin of rights and title, primary positive rights and not simply a matter of evidence. The common law estoppels in pais were never favored by the courts, and they were spoken of as odious. The legal estoppels in pais are: (1) By Livery, (2) By Entry, (3) By Acceptance of Rent, (4) By partition, and, (5) By the acceptance of an estate. Those are the common law estoppels to-day with the exception of those which have become obsolete on account of changed conditions.

The estoppel by livery worked in this way: A man who had given livery of seisin was deemed to be estopped from doing any thing to contradict that livery, just as a man is estopped from denying his written conveyance.

Another of these common law estoppels was by entry. If a party entered into a lease at common law which was under seal he was estopped from questioning the landlord's title. We have at present the common law estoppel by entry, but it is somewhat different from the old estoppel because it arises whether the lease is under seal or not under seal.

One peculiar thing about these common law estoppels was that the party was precluded from speaking the truth, not because equity and justice demanded that he be precluded, but because of the seeming importance of observing a settled maxim of law. So in such a case it was impossible for a party to get justice except by going into equity and asking the court to restrain the enforcement of the strict legal rule for the reason that equity and justice required that restraint. Inasmuch as these common estoppels were harsh in nature they soon became to be odious, and the courts would not recognise



the estoppel unless the facts clearly indicated that the case was clearly within the rule of the estoppel in pais. The court requiring in pleading an estoppel that great particularity be observed. It must be particular to a certain intent in particular.

An equitable estoppel arises from conduct, but it has never been regarded as odious, for the reason that the object of an equitable estoppel is to work out in every case justice between the parties. It is applied that equity and justice may be done in individual cases.

The equitable estoppel was seized upon by the common law courts for the purpose of lengthening the arm of the common law courts and reaching out and adjudicating matters that could not be reached and satisfactorily adjudicated under the strict rule of legal estoppel. So quite early in the history of equitable estoppels we find the common law courts adopting them.

In

Horn v. Cole, 51 N.H. 287, Case Book 100 is contained the whole doctrine of equitable estoppel. It thus appears that what has been called an "equitable estoppel" and sometimes, with less propriety, an "estoppel in pais" is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights,--though now with us, like many other doctrines of equity, habitually administered at law. But formerly the practice was different, and suits at law, the courts being incapable of giving effect to this equity, were often enjoined where the party insisted on his rights at law contrary to the equitable doctrine as in Raw v. Pote, Stiles v. Cowler, and Webber v. Farmer, *qua supra*.

It would have a tendency to mislead us in the present inquiry, as there is reason to suspect that it has sometimes misled others, if we should confound this doctrine of equitable estoppel with the legal estoppel by matter in pais. The equitable estoppel and the legal estoppel agree indeed in this, that they both preclude from showing the truth in the individual case. The grounds, however, on which they do it are not only different, but directly opposite. The legal estoppel shuts out the truth, and also the equity and justice of the individual case on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. For reasons of general policy a record is held to import incontrovertible verity, and for the same reason a party is not permitted to contradict his solemn admission by deed. And the same is equally true of legal estoppels by matter in pais. Certain acts done out of court and without deed were, by a technical and unyielding rule of law, upheld on like grounds of public policy, and followed always by certain legal consequences. The legal effect of such acts was not permitted to be controverted by proof.





For this reason, because legal estoppels, whether by record, deed, or matter in pais, shut out proof of the truth and justice of individual cases, they have been called odious, and have been construed with much strictness against parties that set them up.

Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth."

#### DICTATION

We should be careful not to confuse equitable estoppels with legal estoppels in pais. Equitable estoppels arise from matters in pais and are hence perhaps an outgrowth of legal estoppels in pais, but they are to be distinguished from them in that the former have their foundation in justice and good conscience, while the latter simply enforces a rule of law irrespective of the equities of the case. Equitable estoppels have been developed by courts of equity, although they are now applied by courts of law. Both kinds of estoppels preclude the showing of the truth in the individual case, but they do it on distinctly opposite grounds,--the legal estoppel in order to enforce a rule of law,--the equitable estoppel in order to work out justice and equity between the parties.

Pomeroy, para. 802

51 N.H. 287, Ill. Cases 100)

I will now state to you specifically what I have said parenthetically. With a single exception, equitable estoppels may be insisted upon and urged in courts of law just as freely as in courts of equity, and in order that the court of equity make take or retain jurisdiction of a case of equitable estoppel it must appear that there is some other reason for the jurisdiction besides the equitable estoppel.

#### DICTATION

Although these estoppels are called equitable they are, with perhaps a single exception, enforceable in courts of law as well as in courts of equity. The mere fact that a case involves a question of equitable estoppel will not of itself give the equity courts jurisdiction. It must appear further that there is something in the case that demands equitable cognizance and that the party is entitled to some one of the equitable remedies.

100 U. . 578( Ill. Cases 107)

126 U.S. 241

49 Mich. 444



XX. EQUITY JURISPRUDENCE. Ch. 82.

Now before explaining to you in detail the essentials of an equitable estoppel, I wish to discuss a preliminary question that has given the courts no little trouble: Is fraud essential to an equitable estoppel?

#### DICTATION

As a rule it is not necessary to show fraud in order to raise an equitable estoppel. Where this estoppel is recognized in the absence of fraud it is by force of the principle that where one of two innocent persons must suffer, the loss must be borne by the one whose conduct has rendered the result possible.

-----oOo-----

Dec. 16, 1903.



## LECTURE XXI.

-----oOo-----

Fraud at the present time is not usually regarded as an essential element to an equitable estoppel, altho you will find some cases that hold to the contrary. If we were to hold that fraud is essential to every case of equitable estoppel many estoppels that have been recognized by the courts could no longer be enforced. Take the case of a party taking an apparently certified check to the bank in order to ascertain its validity. The teller assures him it is all right. The bank would be estopped from denying the certification. But in a case of that kind there would be no fraudulent intent on the part of the teller. Take the case of property in the hands of a party to whom it apparently belongs. Another party asks him if he has the title to it. The party fearing that some of his creditors may desire to levy upon it, says that it belongs to another. There is no intention to deceive the party inquiring because he is not a creditor. Under those circumstances there is no intention to defraud. But in a proceeding against the goods as those of another the owner would be estopped from claiming them as his own.

There are very many cases where fraud does not enter in that the courts hold to be equitable estoppels.

Undoubtedly in most cases of equitable estoppels there is fraud either actual or constructive. In nine cases out of ten the step is taken to deceive some party, but that fraud is not absolutely necessary to the existence of the estoppel.

Fraud is essential to an equitable estoppel from one point of view. It is certainly fraudulent for a person to claim the advantages of an estoppel under circumstances where it would be inequitable for him to do so, and it is certainly fraudulent for a person to claim that he ought not to be bound by the estoppel where equity and justice require that he should be bound by the estoppel.

It is also argued that actual fraud must exist before an equitable estoppel can be maintained. Excepting in one class of cases actual fraud is not essential.

## DICTATION

Fraud is not an essential ingredient of all equitable estoppels. Where an estoppel is recognized in the absence of fraud it is by force of the principle that when one of two innocent persons must suffer it must be borne by the one who by his conduct has rendered the injury possible.

In many cases of equitable estoppel the fraud is found in the subsequent attempt to controvert the representation.

6 Adolp & Ellis, 469

50 N.Y. 575( Ill. Cases 110)



69 N.Y. 113  
 51 N.Y. 287( Ill. Cases 100)  
 87 Tenn. 89 ( Ill. Cases 114)  
 93 Ind. 570  
 71 L.R.A. 522  
 Pomeroy para. 803-5-6.

see contra:

93 U.S. 526( Opinion delivered by Justice Field)

-----

Here is an exception that I wish to impress upon you. Equitable estoppels when they affect the title to real property, that is, where the title to real property is sought to be changed on account of the equitable estoppel, the party against whom the estoppel is sought to be urged must be shown to have been guilty of actual fraud, or such negligence as would be regarded as the equivalent of fraud. This difference is due to the statute of frauds. In most cases where equitable estoppel is relied upon as affecting the title to realty the question arises on the equity side of the court, but it may arise on the law side of the court where a person in possession of real property and claiming title thereto by virtue of the equitable estoppel is proceeded against by the holder of the record legal title.

Wherever you ask the court to change or transfer the legal title to real property and base your action upon an equitable estoppel you must in making out your prima facie case show fraud, on account of the Statute of Frauds which requires the transfer of real property to be in writing and nothing will replace that statutory requirement except fraudulent action.

If to allow a person to shield himself behind the Statute will result in fraud, then equity will not permit the statute to be enforced.

#### DICTATION

But in case the equitable estoppel will affect the title to land it must appear that the party against whom the estoppel is urged has been guilty of actual fraud, or such negligence as would be equivalent to fraud. This because of the requirements of the Statute of Frauds.

Pomeroy, Vol. II, para. 807  
 34 Mich. 383  
 104 Ill. 235  
 102 Ill. 514

Every equitable estoppel in order to be urged as such must contain certain elements. In the first place (1) There must have been CONDUCT, either in the form of acts, language or





silence, amounting to a representation or concealment of facts.

# DICTATION

## ESSENTIALS OF EQUITABLE ESTOPPEL.

(1) There must have been conduct, either in the form of acts, language or silence, amounting to a representation or concealment of material facts.

102 U.S. 68

51 N.H. 324

-----

But the statement constituting the representation need not necessarily be an express one. It usually is an express one, but it need not necessarily be. Whatever is naturally implied from the language used if it has induced action may be the basis of an estoppel. Suppose, for example, I am about to purchase a mortgage security; I go to the mortgagor and ask him if the mortgage is all right, if there is any defense to the mortgage. He says in reply, not directly, 'I have no defense, the mortgage is all right,' but, 'I do not usually execute securities unless they are good.' That is not a direct statement, but he would be estopped under the circumstances because it would be necessarily implied from the language that he uses under the circumstances that he represented the security to be good.

# DICTATION

The statement constituting the representation need not necessarily be an express one. Whatever is naturally implied from the language may be taken into consideration.

Bigelow on Estoppel, p 570

L.R. 10 C.P. Div. 307

- - - - -

In order to work an estoppel the representation must be such as would naturally lead a man of ordinary prudence to act upon it. The mentality and experience of a man must always be taken into consideration.

# DICTATION

Extravagant statements cannot be the basis of an estoppel ordinarily, but the intelligence and experience of the person must always be taken into consideration.

Bigelow on Estoppels, p 572

-----



## LECTURE XXII.

---oOo---

(continued from last lecture)

REPRESENTATION MUST BE CERTAIN.

Bigelow on Estoppels, p. 579

41 Mich. 472

41 Mich. 453

38 Mich. 475

MUST BE TAKEN IN ITS NATURAL SENSE.

Bigelow, p. 580-1

29 Mich. 228

CANNOT BE ENLARGED.

Bigelow, p. 582

-----

At the close of the last lecture I called your attention to the essentials of an equitable estoppel. A representation to be the basis of an equitable estoppel must be material to the transaction. It must have induced action of some kind on the part of the party claiming the benefit of the estoppel. The conduct or representation need not to have been the sole inducement to the action. If it is one of the several inducements that have led to the action on the part of the person claiming the benefit of the estoppel that will be sufficient. The rule is the same as it is in connection with fraudulent representation. If the party would not have acted but for the conduct or representation then it may be the basis of an estoppel.

## DICTATION

While the conduct that is at the basis of the estoppel must be material and such as to produce action, it need not have been the sole inducement. If the party would not have acted except upon the inducement then the inducement is sufficient as a basis of an estoppel.

Bigelow, Estoppels, p. 582

A REPRESENTATION CANNOT BE THE BASIS OF AN ESTOPPEL UNLESS IT HAS BEEN FREELY MADE. If it is in any way the result of duress or fraud, it cannot be urged as a basis of an estoppel. As an equitable estoppel is essentially a creation of equity jurisprudence if there is anything in the transaction to indicate inequitable action on the part of the party claiming the benefit of the estoppel, the estoppel will not be allowed.

In the 44 N.Y. 398, you will find a good illustration of this principle. There a sale was made of a certain number of watches that were represented to be of a certain grade, and the party purchasing agreed to pay a certain price



for a first grade watch. As a matter of fact the watches were of an inferior quality. The party making the purchase was not an expert in such matters, and the situation was such that he was obliged to rely upon the representations of the party with whom he was dealing. As security for the payment of the purchase price the purchaser gave a real estate mortgage, and in order that the mortgage might be negotiated the seller induced the purchaser as a part of the transaction to sign a statement to the effect that the mortgage was given for a good and valuable consideration and that in connection with the transaction there had been no fraud. Ordinarily the purchaser would be estopped from setting up unfair dealing, but the whole transaction was vitiated by the fraud of the seller. The court held that when the mortgage came to be foreclosed the fraud of the original transaction could be interposed as a defense, and that this paper would not operate as an estoppel.

#### DICTATION

A REPRESENTATION CANNOT BE THE BASIS OF AN ESTOPPEL if it has been obtained by duress or by fraud, or by artifice of any kind.

Bigelow on Estoppels, p. 583  
59 Mich. 509  
44 N.Y. 398  
46 N.Y. 1

A party may be estopped by his acts, by means of language or by means of silence or concealment. If a party makes a representation that is not true by which another is misled to his injury, in order that an estoppel may arise what must be the knowledge of the facts on the part of the party making the representation? Here is a party remaining silent when it is his duty to speak, and sees his property transferred to another. Under those circumstances usually the party will be prohibited from claiming his good or property thereafter. Where a party remains silent when it is his duty to speak he is guilty of fraud. But mere silence alone is not sufficient under some circumstances to an estoppel. If the party remaining silent does not know that he has an interest, so that his silence does not represent a fraudulent attitude on his part, then his silence cannot be the basis of an estoppel. In order that silence be the basis of an estoppel it must be the person's duty to speak. In order that silence be the basis of an estoppel, that silence must have been induced by fraudulent intent on the part of the person. An innocent silence can never be the basis of an estoppel.

#### DICTATION

What must be the knowledge of the party who is estopped by his representation or by his silence? A party is estopped



by his silence only when it is his duty to speak. No estoppel if a party remains silent without knowing of his interest,, unless it be under such circumstances that negligence may be imputed.

10 Adolph. & Ellis 90  
82 N.Y. 32  
82 N.Y. 327  
41 Mich. 54  
Bigelow on Estoppels, 595  
107 N.Y. 310-16  
-----

Suppose the estoppel is claimed by virtue of the words or acts of the party what must be the attitude of the party using the words or indulging in the acts in order that he may be estopped? Must he know the truth. I think the following propositions will be found to be sustained by the authorities:

(1) In order that estoppel may arise by virtue of words or acts it must appear that either the party had actual knowledge of or, (2) that he acted recklessly without knowing the truth or falsity of his position, or, (3) that he made the representations under circumstances where he is bound to know the truth. If he acted under circumstances in which, on account of his relation to the facts, he was bound to know the truth, then even though he did not know the truth, the representation may be the basis of an equitable estoppel. If he thinks he knows the facts, if there is no duty resting upon him to know the facts, and makes the representation under such circumstances as would lead an ordinary man to make the representation, his representation cannot be the basis of an estoppel any more than there could be an action grounded upon fraud. Equity will not impute an unfair motive.

As a general rule it may be said that a man is presumed to know the truth in regard to the facts within his own special means of knowledge. If a man is so situated that ordinarily he would know the truth, the court will assume that he does know the truth.

There is an illustration of this principle in the 117 U.S. 96, L. Mfgs. Bank v Morgan, to which I think I called your attention before. A man makes deposits through his agents with his bank. The deposits are in the form of checks. From time to time the checks are raised by his clerk who makes the deposits, and the balance placed in his pocket. So that the man's account, as it is represented to him by his bank book, is not his true account. Under such circumstances he brings an action against the bank for the balance. In such a case he would be estopped from showing the dishonesty of his clerk. He would be bound by the statement of the account as it appears in the bank book. He is not in a situation to dispute that because he is in a situation to know the facts. It is his business and duty to keep track of his accounts by examining the bank book when it is returned to him. If he fails to do so and a mistake occurs he is estopped.





It is in accordance with this principle that directors of a corporation are held to know the proceedings of a corporation.

Although there is some conflict of authority, it is probably correct to say that ignorance of the facts due to gross negligence will not prevent an estoppel.

#### DICTATION

An estoppel from WORDS OR ACTS WILL ARISE: (1) Where a party knows the truth and deliberately misrepresents; (2) Where he is reckless in his acts or assertions making no inquiry as to the truth; (3) Where he has acted under circumstances in which, on account of his relation to the facts, he was bound to know the truth. He is presumed to know the truth within his own special means of knowledge.

117 U.S. 96

41 Ill. 85

Pomeroy, 809, Vol. 1.

Bigelow on Estoppels, p. 612 and on.

-----

Long acquiescence is sometimes accepted as a substitute for knowledge of the facts at the time of the transaction. Thus where there has been an honest difficulty in determining the boundary lines between two neighboring pieces of property, the parties have actually agreed by parol upon a boundary line, and have occupied with respect to it, each party is estopped by his agreement and acquiescence therein to set up the true boundary if afterwards discovered. This doctrine is known as the practical location of boundary lines.

#### DICTATION

LONG ACQUIESCENCE IS SOMETIMES ACCEPTED AS A SUBSTITUTE for knowledge of the facts at the time of the transaction. Thus where the true boundary line cannot be discovered or ascertained, a line agreed upon by the acquiescence of the parties, will be held to be the division line between the parties, and each party will thereafter be estopped from questioning it.

87 Tenn. 89( Case Book 114)

20 Mich. 433

26 Mich. 322

45 Mich. 22

62 Wis. 184

This doctrine, however, is not approved in some states.

Bigelow on Estoppels, 618-20

In a majority of the states the doctrine is approved.

-----



In order to claim the estoppel the party to whom the representation is made must be ignorant of the facts, not only when the representation is made, but also when he acts upon it. If he knows the facts, or was so situated that he ought to have known them, then no estoppel will arise.

106 U.S. 447

51 Wis. 232

As a general proposition a party is entitled under ordinary circumstances to claim the estoppel is not entitled to claim the estoppel if he is so situated that he might have known the facts. Ordinarily where the circumstances are such as naturally would invite inquiry, the party to whom the representation is made is bound to know the facts. But there are cases where this rule will not be applied. The representation may be of such a nature as to throw the party off his guard and keep him from seeking information where he would otherwise naturally look for it. Under such circumstances he would not be bound to make inquiry. And so it has been said that where the representation has been so positively made that it would induce an ordinary business man to rely upon it he may claim the benefit of the estoppel even if he might have ascertained the truth by making inquiry. As has been said this proposition rests upon the mistaken assumption that facts represented by one party puts the other upon inquiry as to their truth. If a contracting party has a reasonable right to rely upon the express statement of an existing fact, the truth of which is known to the opposite party, and represented to him as a basis of a mutual agreement, there is no obligation to investigate the statement, to the truth of which the party has deliberately pledged his faith.

#### DICTATION

The party to whom the representation is addressed cannot claim an estoppel ordinarily. if he was in a situation to know the facts. However, if the representation is made in such a way as to throw the ordinary man off his guard and to lead him to act without inquiry, the party to whom it is made may claim the benefit of the estoppel.

31 Mich. 36

32 N.Y. 275

Pomeroy, para. 810

Bigelow, ps. 626-8.

-----oOo-----

Jan. 11th, 1903.



## LECTURE XXIII.

-----oOo-----

It is of considerable importance for us to determine as to the intention with which a representation is made or an act indulged in, out of which it is claimed an estoppel has arisen. It is necessary that the party making the representation should do so with the intention of inducing action on the part of the one to whom the representation is made. Is it necessary for you in making out your prima facie case of estoppel to show that the representation has been made directly to the person claiming the benefit of the estoppel and with the intention of inducing him to act. In the great majority of cases you will find the courts holding that the representation need not necessarily be made directly to the party who takes advantage of it. It need not be made with the intention of inducing action on the part of any particular person, but that it is sufficient if the representation is such as would naturally induce a man to act provided he finds himself interested in the subject matter of the representation.

There is one class of cases where the representation, if it is to be the basis of an equitable estoppel, must have been made directly to the party who is claiming the benefit of the estoppel, and must have been made with the intention of inducing that party to act. Wherever the representation has to do with the title to realty and it is sought by virtue of the equitable estoppel to change that title, then we have a case where the representation must be made with the intention to induce that party to act to whom it is made. We might have an equitable estoppel in regard to realty where it would not be necessary for the party to show this intention to mislead the particular party claiming the benefit of the estoppel. We may have a case of estoppel in regard to realty where the effect would not be to transfer the title, there may be an equitable estoppel as to the possession and as to other rights in realty, etc., where the principle I have suggested would not apply.

## DICTATION

In the great majority of cases it is not necessary to show that the representation has been made with the intention that it should be acted upon by any particular party. If the representations are such and are made under such circumstances that any person interested in the subject matter would be misled by them they will be sufficient to form the basis of an estoppel.

51 N.H. 287

30 N.Y. 206

Pomeroy, para. 811

But this is not the case where the representations are made for the purpose of inducing action in regard to the title



to realty. In such cases the purpose of the representation must be shown and as a rule no one can take advantage of it excepting the party to whom it is made.

93 U.S. 326

-----

The next requisite to the estoppel is that the conduct must have been relied upon by the party claiming the benefit of the estoppel. The representation must have induced action and it must appear that the party relying upon it would suffer loss if the estoppel were not allowed.

55 N.Y. 456

57 Wis. 534

Pomeroy, para. 812

Bigelow on Estoppels, pages 638 and on.

Inasmuch as equitable estoppel is governed by equitable principles, it follows that the party claiming the benefit of the estoppel must be free from fraud in the transaction and that he must have acted in good faith and with reasonable diligence. If the party who made the representation has been led into this representation by the fraudulent action of the other party then is not estopped from correcting himself when the opportunity offers.

The estoppel operates not only between the immediate parties thereto, but also between their privies, whether by blood, by estate or by contract.

These are the general principles of the equitable doctrine of estoppel by conduct, but before leaving the subject there are one or two collateral matters that do not readily group themselves under any particular heads that I have suggested, that should receive a moment's attention.

(1) Equitable estoppel as applied to married women. There was some conflict of authority upon this question, but the modern tendency of authority is in one direction. It has been laid down by some courts that the doctrine of equitable estoppel has no application to married women. It was argued as married women could not bind themselves by contract neither could they bind themselves by their conduct. It would be erroneous to allow her to accomplish by conduct what she could not accomplish by the settled rules of law. So long as the common law disability continued this conclusion was undoubtedly the correct one, but upon the removal of this disability by statutes, there has been a change of attitude of the authorities and I think that I can safely say that whenever the statutes are such as to enable married women to contract to the same extent as a feme sole, she will be bound generally by the doctrine of equitable estoppel. The extent to which she is bound will depend upon the extent to which the liberty of contracting has been accorded to her.





I think that it may be said, that without regard to legislation, the decided weight of authority is that estoppel will be sustained against a married woman in case of fraud, even though there has been no very great change of the contractual liability of married women.

### CITATION

#### INCIDENTAL AND COLLATERAL MATTERS:

(1) At common law married women were not bound by equitable estoppel. This was due to the contractual disability under which they labored. But where this disability has been removed by statute, it is very generally held that the doctrine of equitable estoppel applies to married women. And it is held, almost without exception, even though there has been little statutory change, that the married woman will be bound by the doctrine of estoppel if she has been guilty of fraud in connection with the transaction.

2 Grey (Mass) 166  
117 Mass. 244  
53 N.Y. 93  
106 N.Y. 74  
31 Pa. St. 456  
35 Mich. 148  
46 Wis. 677  
Pomeroy para. 814  
-----

(2) ESTOPPEL AS APPLIED TO INFANTS: It is the general rule that an infant cannot be bound by the doctrine of equitable estoppel.

10 N.Y. 184  
52 N.Y. 249

This rule, however, according to some authorities, where the infant has been guilty of fraud and where fraud is the basis of the action, has not been recognized.

Pomeroy para. 815  
Bigelow, p 492  
Ewell's Leading Cases on Infancy, page 226  
-----

I shall devote the rest of my time to the equitable remedy of  
INJUNCTION.

This matter of injunction is a matter of great deal of importance, particularly at the present time. The injunction is now more frequently used than in the early history of the court, although the power of the court of equity to reach out by means of the injunction and restrain the commission of



of a wrong or to restrain the violation of a contract has been recognized from its earliest history. It was the injunction that stirred up opposition to the court of equity during its formative period, particularly on account of the practice of the equity judges in issuing injunctions to restrain proceedings on the law side of the court where in the judgment of these judges the cases should be settled upon equitable and not legal principles. I think that the jurisdiction of the court of equity has been criticized and attacked more frequently during its entire history on account of its use of the injunction than for any other reason. But after a time it came to be recognized, even by the common law judges, that equity had authority to do this. Wherever the defense to an action is equitable in its nature and cannot be fully developed on the law side of the court by the application of common law principles, the practice is to go on to the equity side of the court and file a bill asking for an injunction to restrain the proceedings at law and that the whole matter may be transferred to the equity court. That is not necessary in code states where equitable defense may be interposed.

The injunction can only be issued by a court having equity powers. There is nothing like the remedy by injunction on the law side of the court. An injunction is a restraining writ issued by an equity court that, by its terms, forbids the defendant, his agents and those that represent him, from doing a certain thing or things specified in the writ. The injunction may be defined in a general way as a judicial process operating in personam, and issuing out of a court of equity, or a court having equity powers, that requires the person to whom it is directed to refrain from the commission or continuance of some particular act.

The ordinary injunction is prohibitive in its nature. Its object is to restrain a party from committing a wrong. But there is another kind of injunction that is called a Mandatory Injunction. It is in effect a command to the defendant to do some particular thing specified in the injunction. It has always seemed to me that this injunction was wrongly named. The very meaning of the term 'injunction' indicates a restraining process.

The restraining or prohibitory injunction may be issued as an interlocutory writ for the purpose of tying up the property pending litigation so that the parties may remain in statu quo. It is not then in the form of a decree, but in the form of a writ commanding the defendant to keep hands off until the rights of the parties have been decided. The injunction in this form is issued without any investigation into the merits of the case. It is based upon the statement of the case as set forth in complainant's bill of complaint. It is issued upon the prima facie case made out by the bill.



## DICTATION

## INJUNCTION:

The injunction is a judicial process that operates in personam and requires the person to whom it is directed to refrain from the commission or continuance of some particular act.

The ordinary injunction is preventative or prohibitive in character, and may be issued either in the form of an interlocutory writ or in the form of a final decree.

We have also the mandatory injunction which commands or directs a defendant to do some particular thing. This injunction only issues in the form of a final decree.

High on Injunction, para. --2  
 Bispham principles, para 400  
 20 N.J. Eq. 379( Case Book 725)  
 37 N.J. Eq. 6 'Case Book 729'

A bill filed for an injunction as a final remedy is known as an 'INJUNCTION BILL'. And the decree is based upon the testimony that is taken in the case. Where the injunction is interlocutory it is based upon the statement of the case made in the bill.

The court of equity never issues an injunction except upon the sworn statements of someone who knows the facts. Where the injunction is to be interlocutory the sworn statement is found ordinarily in the bill of complaint. If the object of the suit is for a final injunction, then the bill need not be sworn to for the reason that injunction in that case is a final decree based upon the testimony that has been taken in the case. If you apply for an interlocutory injunction you must first see that the bill is sworn to and second you must have attached to the bill an affidavit or affidavits from parties who know the facts that you have set up in the bill in order to strengthen the case that you have made in the bill. In some states it is utterly impossible and contrary to practice for a court to issue the injunction in an interlocutory proceedings unless the affidavits of the other parties than the complainant have been attached to the bill of complaint. The object of these affidavits is to strengthen the judgment of the court.

-----oOo-----

Jan. 12th, 1903.



## LECTURE XXIV.

-----0-----

As I said in the last lecture, no injunction, either interlocutory or final, can be issued excepting upon a sworn statement. In case of an interlocutory injunction, the sworn statement is in the bill with affidavits attached thereto supporting the bill, (in some cases the statement may be in the form of affidavits alone). In case of the final injunction sworn statement is found in the testimony of the witnesses in the case.

These affidavits are made before the suit is properly or formally brought because as a rule the interlocutory injunction is allowed before the suit is formally begun. That being the case the affidavits need not be entitled in the case. The bill is not in most cases entitled in the case. The case made by the bill is the case upon which the court passes. It is an ex parte proceeding in a great many cases. A party may get an interlocutory injunction without notice to the other party if he can convince the court that notice to the other party may defeat the very object for which he seeks the injunction. The court in granting the preliminary injunction does not pass upon the merits of the case. The court simply says, upon the prima facie case as presented to me by the bill of complaint it appears that the complainant is entitled to this extraordinary writ.

The injunction never issues excepting upon the order of the court.

You must always incorporate in your bill a prayer for an injunction. Your prayer should be so comprehensive that the party who fills out the writ need only refer to the prayer to fill out the writ.

Your prayer for an interlocutory injunction may be incorporated in your bill even though you do not intend to apply for an interlocutory injunction in the beginning of the suit. It is well to insert it in the bill so that if need be you may procure the injunction without delay.

In the U.S. courts an injunction will not issue without notice to the other party. In order that the Federal court may protect the complainant where notice would defeat the very object which he seeks to get by the interlocutory injunction, it has provided for an temporary restraining order of the court, during the pendency of the application for the writ.

Ordinarily the injunction is issued by the judge, but there are other officers with authority to issue the writ. An Injunction Master may issue the writ. The Master in Chancery is very frequently an Injunction Master with authority to issue the writ. In Michigan, the Circuit Court Commissioner has authority to issue the writ.





XXIV. EQUITY JURISPRUDENCE. SR. 98.

The court cannot subsequently be held to be bound as to the merits of the controversy by its decision as to the interlocutory injunction.

In the majority of cases where an interlocutory injunction has been granted, the defendant in convenient season moves to have the injunction dissolved. Here the real test as to the propriety of the issuing of the injunction is made. In order to make a motion for a dissolution of the injunction the defendant must have a basis for his motion and that basis must be in his sworn answer.

The injunction cannot issue before the issuing of the subpoena. But the injunction may be served at the same time, and ordinarily they are served at the same time.

The object of the preliminary injunction is to preserve the property in statu quo until the merits of the case can be determined upon.

Both the interlocutory injunction and the final injunction may be sought in the same suit or proceedings.

DICTATION

A fundamental principle underlying all injunction cases is this: The injunction will never be granted where the REMEDY AT LAW IS FULL AND ADEQUATE, but it will always be granted if the case is properly made where the legal remedy will not be adequate.

Watson v. Sutherland, 5 Wall 74; New Ill. Cases 732

In regard to the dissolution of an injunction, the rule is that if the answer that defendant interposes as a basis for his motion to dissolve meets fully and completely the equities in the bill and denies all these equities, it is the duty of the court to dissolve the injunction.

\*\*\*\*\*

Where the subject matter of the controversy is equitable an injunction will always issue for its protection. The question as to the adequacy or inadequacy of the legal remedy cannot arise.

Pomeroy, Vol. 1, 340-5

The injunction is very frequently used in connection with other equitable remedies. Indeed the equitable remedies would in many cases practically without effect if not accompanied by the remedy of injunction. The injunction in such cases is used to keep the property in statu quo, pending the equitable investigation.

IN CERTAIN CASES THE INJUNCTION may be used to restrain the violation of contracts. This jurisdiction, however, is extraordinary and will not be recognized excepting in case of inadequacy of the legal remedy, and in order to prevent a multiplicity of suits.



The natural jurisdiction over contracts is the jurisdiction of the law courts. The natural judgment in regard to contract is the judgment for damages. In order that an injunction may issue to prevent the violation of a contract, the contract must possess all the elements necessary to enable it to be specifically enforced, such as consideration, certainty, mutuality, freedom from oppression, freedom from all inequitable qualities.

Equity is said to abhor a multiplicity of suits, and equity will take jurisdiction where the situation of the parties is such that in the absence of that jurisdiction suit after suit must be brought in order to give adequate relief.

#### DICTATION

In order that an injunction may be used for this purpose, the contract must be certain and not in any way be oppressive, and must, in a general way, possess all the essentials that are necessary for a contract to possess in order to be specifically enforced.

If the contract possesses these characteristics, then it is as much a matter of course for the court to enforce it indirectly by means of the injunction if it is negative in its terms as it is for it to enforce it by means of the action of specific performance if it is affirmative in its terms.

The injunction is very frequently used to restrain the violation of restrictive covenants in leases, deeds and agreements by which an equitable servitude in regard to the land has been created. The intervention of equity is justified not only upon the ground of difficulty in estimating damages at law, but also an injunction is necessary to prevent a multiplicity of suits at law.

In connection with the above dictation I will cite the cases of

High on Injunctions, II, para. 1106-8  
48 Ohio St. 324 (Case Book 735)

The lease may contain negative stipulations to the effect that the land or building covered by the lease shall not be used for certain purposes; or the stipulation may be negative in effect though not in form, for example, that the premises are to be used for a certain purpose, the inference being that they are not to be used for any other purpose. In a Kansas case a building was rented for hotel purposes. The lessee sublet a part of the hotel office for a real estate office. An injunction was granted to restrain the violation of the contract.

-----oOooOo-----

Jan. 17th, 1904.



# LECTURE

-----oOo-----

## DICTATIO

The injunction is frequently used to restrain the violation of restrictive covenants in leases, usually covenants as to the use of the property. Basis of jurisdiction inadequacy of the legal remedy and to prevent a multiplicity of suits. In order that the jurisdiction may attach it is not necessary that the violation of the covenant amount to a nuisance.

High on Injunctions, Vol III, para. 1142-9  
4 Sanf. Chanc. (N.Y.) 587  
39 Wanss 193( Case Book 740)

Principal also applies in favor of lessee as against lessor.

23 J. Equity 161( Case Book 738)

Similar to this class of cases is the jurisdiction in regard to covenants, that is, negative covenants in deeds. Property is very frequently sold and in the deed of conveyance is a stipulation in regard to the way in which the property shall be used--usually in regard to the character of buildings that shall be erected upon the property, the lots of the building, or its architecture. Under such circumstances the grantee takes the property burdened by these covenants, which are called equitable easements, and they may be enforced, and usually can only be enforced by a court of equity through the medium of an injunction. If the grantee attempts to violate the covenant by building in a different manner than that stipulated in the covenants the grantor may restrain the building by injunction. But the remedy is not confined to the grantor. Any other grantee who is laboring under a similar restriction can go into equity and prevent the violation.

These are covenants that run with the land and bind every subsequent grantee provided he takes with notice, and under ordinary circumstances he would if the covenant is contained in the deed because in most jurisdictions every one is bound to know the facts that are stated in all of the deeds that constitute the chain of title.

## DICTATION

The injunction may be used to prevent the breach of covenants contained in conveyances where such covenants have to do with the use of the property. Suits of this kind may be brought by the grantor, and where there are

similar conveyances with similar restrictions by any grantee against any other grantee. Covenants of this kind impose upon the property what is known as an equitable easement, and subsequent grantees are bound thereby.



49 Pa. St. 289  
 70 N.Y. 440  
 34 N.J. Eq. 206

P -----  
 Principal applies equally  
 Principal applies equally as against vendor.  
 3 Paige 254  
 4 Paige 511

-----

If a party desires to take advantage of his right of injunction to prevent the violation of a negative covenant either in a lease or a deed he must act promptly.

High on Injunction, Vol. II, para 1159

-----

There is another class of contracts that courts of equity will recognize and take cognizance of and enforce indirectly by means of the injunction, namely contracts that have in view personal services. You will find scattered through the text books and reports expressions of this kind: That a court of equity will always enforce a contract that is negative in form by means of an injunction prohibiting its violation where the court would act directly and order a decree for specific performance if the contract were affirmative in form. Sometimes you find the following statement: that a court of equity will never act in this negative way excepting when the contract is of a class that it would enforce affirmatively by a decree for specific performance. Expressions of that kind must be taken with some degree of allowance. Although the proposition is true as a general proposition, it is not entirely without exceptions. Suppose a man makes a contract with an eminent actor to act in his theatre for a certain length of time. The actor is approached by a rival manager and offered larger inducement if he will act in his theatre. Can the first employer go into a court of equity and get a decree for specific performance of that contract. No. The court will not grant a decree of that kind because it cannot enforce it. A court of equity cannot make an actor act if he does not want to act. Where the object of a contract is to secure services of a peculiar kind, that is, personal services of a peculiar kind, the court is perfectly helpless so far as specific performance is concerned. Then the question arisen can a court of equity enforce a contract of this kind by preventing its violation. For a long time the courts took the position that they could not enforce contracts of this kind indirectly by means of the injunction because the contract was not one that could be enforced affirmatively by the ordinary remedy of specific performance. But after a time the





court began to recognize that injustice might follow from the application of this rule. They then took the position that if the contract contained a negative covenant that the court would then enforce it indirectly by preventing its violation by issuing an injunction. If the actor agreed that he would perform his services for a certain manager, and then stipulated that he would not perform them for any one else, then if he violated his contract the court could issue an injunction. That position was first taken in England in the case of

*Lumley v. Wagner*, 1 Delex, M & G 604, which has been followed in this country. The doctrine within the last fifty years has become firmly established in this country to the effect that if there is a negative stipulation in the contract the court will always indirectly enforce it by issuing an injunction, even though it were not of a kind that the court could enforce affirmatively through the ordinary remedy of specific performance.

Later in England in the case of *Montague v. Flockton*, 18 Eq. 139, the court went a step farther and held that although there is no negative stipulation in the contract, still, if the contract is of such a nature that a negative stipulation may be presumed or inferred, then equity should interfere, even though the contract is not one that could be affirmatively enforced. The court went a step farther and said that the negative stipulation will be implied in the class of cases mentioned, namely, actor's, artist's, Musician's, Lecturer's, etc. contracts for personal services.

The courts in this country have not gone so far as that, and I notice recently that the English Courts seem inclined to recede from that doctrine.

The American doctrine as settled by the consensus of opinion is that the court of equity will interfere and enforce such contracts indirectly by means of the injunction only when the contracts contain a negative stipulation. And they will restrain the violation of the contract even where it contains a negative stipulation unless the services are of an extraordinary character. For example take the case of *Rogers Locomotive Co. v. Rogers*, which I will cite for your note books in a few minutes. Here a man by name of Rogers was employed by the Rogers Co. to work as a salesman for a stipulated time. Another company offered the salesman better inducements if he would work for them hoping to draw trade by the similarity of the employee's name and that of his former employer. The Rogers Co. went into equity and sought to restrain by injunction the violation of this contract. The court said that this contract could not be enforced affirmatively, and as the contract is for services that the market will



readily furnish we cannot see that the remedy at law is not adequate, and complete.

### DICTATION

Courts frequently interfere to restrain the violation of contracts for personal service where the services stipulated for are of a peculiar and unique kind, even though the contract would not be affirmatively enforced through a decree for specific performance. In England the injunction would issue at the present time even though the contract contain no negative stipulation. In the U.S. the contract must contain a negative stipulation, or at all events it must be so worded as to imply a negative stipulation.

If the contract provides for services of an ordinary kind the court will not interfere to restrain its violation by an injunction even though the contract is negative in form.

58 Conn. 356( Case Book 620

1 De Gex, 11 & G 604( Case Book 605)

L.R. 16 Eq. 139

16 Fed. 37 (Case Book 698)

Courts of equity will also, by injunction, prevent a person from disclosing trade secrets.

Thum Co. v. Tlonzynski, 114 Mich. 149( Case Book 746)

The court of equity frequently interferes by means of the injunction to restrain the violation of contracts restraining the exercise of a trade or particular business for a certain time and within a certain territory.

58 Pa. St. 51 ( Case Book 742)

34 Mich. 490

23 N.J. Eq. 389

32 Md. 561

In proper cases the injunction may be used to restrain the commission of a tort. Ordinarily, however, the courts of law furnish a full and adequate relief in cases of tort. Hence the test by which it is determined whether the injunction shall issue in case of a threatened or existing tort is found in the adequacy or inadequacy of the legal remedy. No injunction will issue to restrain the commission of an ordinary tort, but there are some kinds of torts in respect to which it has been settled that the legal remedy is generally inadequate and which equity will ordinarily interfere to prevent by injunction. The first of these is Waste.

Courts of equity at the present time will very generally issue the injunction to restrain the commission of waste or to restrain the commission of threatened waste. Waste is any unlawful use of property that is a permanent injury to the freehold. The remedy by injunction for waste has largely superseded the common law action of waste and also the special action on the case for damages.

-----oOo-----

Continued in next lect



## LECTURE XXVI

-----oOo-----

Continued from Lect. XXIV.

Before the court of equity will interfere however the title of the party seeking relief must be clear and the injury a real one.

Ordinarily the plaintiff's title must be a legal one, but in some instances an equitable title is held sufficient. For example, where a person purchases land at an execution sale and gets simply a certificate therefor, he has a sufficient title to justify him in applying to a court of equity for an injunction against the commission of waste by the judgment debtor in possession.

-----oOo-----

In some jurisdictions you will find that there express statutory provisions authorizing and conferring jurisdiction in cases of waste upon the equity courts. The title of the complainant in cases of this kind must not be in serious doubt. If it is the court will either refuse the injunction or hold the matter over until the title at law may be settled.

The waste must be of a substantial nature, not merely trivial.

As I said in the last lecture, as a general rule, the party in order to maintain his action must show a legal title to the property that is being wasted. But a legal title is not necessary. An equitable title under certain circumstances will be sufficient to sustain the action.

The injunction is very frequently applied for in connection with the foreclosure of mortgages. And sometimes before the mortgage is due and before the mortgagee has a right to foreclose an injunction is applied for by the mortgagee as against the mortgagor. In some states the title of the mortgagee is legal, in others it is equitable, and in others nothing but an equitable right. Suppose you begin to foreclose a mortgage, you cannot perfect the foreclosure until the end of a year. The mortgagor is in possession and he is entitled to possession and to use the property during that time, but he is not entitled to waste it. So in foreclosing a mortgage you may always include a prayer for an injunction to restrain the mortgagor from committing waste. And indeed it is not necessary to wait until foreclosure before getting the injunction. You must show in the first place that the security is slender, and that it will be depreciated and your client liable to suffer loss if the waste is allowed to continue. And you must show that the mortgagor is irresponsible so that a money judgment could not be collected.



An injunction to restrain the mortgagee from committing waste is frequently issued where the mortgagee is in possession of the property for the purpose of foreclosing or for any other purpose. In many states the mortgagee has a right to take possession of the property. In other states the mortgagee cannot take possession until after foreclosure proceedings. In case he has possession, he has no right to commit waste and an injunction will lie to restrain him.

#### DICTATION

An injunction may issue in favor of the purchaser at execution sale although he has not received his deed.

1 Delaware Chan. 64

In favor of mortgagee to restrain waste by mortgagor, and this even though the mortgage is not due. In the latter case, however, it must appear that the security is slender and scanty and the mortgagor is irresponsible.

High on Injunctions, para. 478-83

35 Wis. 358

33 Wis. 358

25 N.J. Eq. 87

-----

Another tort that the court of equity has jurisdiction to restrain by injunction is the case of a PUBLIC NUISANCE. An existing or threatened public nuisance a court of equity has a right to restrain. This may be done at the suit of the public, or under certain circumstances at the suit of a private person. Sometimes you must do so in the name of some public officer, and usually in the name of the Attorney General of the State. That is the law in Michigan. And instead of a bill being filed, a pleading called an Information is filed. It is supposed to be beneath the dignity of the state to apply as complainant.

The information is constructed along the same lines as a bill of complaint in equity. The only difference is that the complainant is the government and is not an 'orator', as the term is ordinarily understood in equity pleading. The complainant does not complain to the court, the complainant in this case being the public, informs the court. Instead of saying 'your orator' you say 'your informant.'

A private person may proceed in a court of equity and get an injunction to restrain the commission or continuance of a public nuisance where that public nuisance especially affects that private person's property to a greater degree than the public generally has suffered.

#### DICTATION

Equity will interfere to restrain by injunction an existing or threatened public nuisance. This is usually done in the name of the state, and is done by filing an information.





A private person who has been specially and injuriously affected by the public nuisance may restrain the continuance of the nuisance by the injunction.

Pomeroy vol. 3, para. 1549  
128 N.Y. 34 (Case Book 773)  
17 E.J. Eq. 75

Equity exercises a very large and important jurisdiction in connection with the issuance of the injunction restrain private nuisance or to remove private nuisances already existing. On account of the difficulty in extimating what would be just compensation indamages and to prevent a multiplicity of suits, equity at a very early day exercised jurisdiction in case of private nuisances. It is very frequently used to protect a man right to lateral support, particularly in cities in connection with building improvements. Each land owner has the right to the lateral support of his neighbor's land. If the neighbor threatens to take away this support by improper excavations the proper remedy would be by injunction. The right to lateral support only extends to the support of the soil, not to the support of any buildings erected upon the soil. Very frequently this right to lateral support extends beyond the right to the support of the soil. A party may have acquired the right to the support of buildings erected on the soil by a special conveyance. His easment may extend not only to the soil, but to the buildings. Or he may have acquired an easment through long occupation.

Formerly the injunction was very frequently used to prevent a party from erecting buildings in such a way as to cut off the light and air from his neighbor's premises. At the present time it is not so often used for the reason that in this country at the present time we do not recognize the English doctrine that the right to light and air may be acquired by prescription. In some of the state, however, the common law prescriptive doctrine prevails and the injunction is there frequently used for the purpose suggested.

But courts very generally recognize that a person is entitled to the air in its normal condition, and he has a right to go into equity and restrain any business or manufactuery from polluting the air and making it unhealthy for the neighborhood. It is only where the neighborhood in which the business is started is a residence neighborhood that equity will thus restrain the carrying on of such business.

There are some kinds of businesses that are recognized by the courts as per se nuisance, as for example, a slaughter house has been held per se a nuisance, that is, a slaughter house in a residence neighborhood, and you may prohibit the continuance of the slaughter house without showing it is a nuisance.

On the other hand it has been held that a livery stable was not a nuisance.



A riparian owner has a right to the water as it passes his property and the upper land owners may not pollute the stream, and he may restrain such use by injunction.

It is also improper for the lower riparian owner to dam up the water so as to throw it back upon the property of his neighbor above.

An injunction also lies to restrain the interference of rights that have been acquired in the water for manufacturing purposes.

#### DICTATION

Equity will issue the injunction to restrain the commission and continuance of a private nuisance. It does this in order to prevent a multiplicity of suits and because of the inadequacy of the legal remedy.

Used to protect rights to lateral support.

57 Conn. 190

46 Mo. 161

To prevent the pollution of the air by manufacturies.

100 Mass. 73

54 Me. 124

63 N.Y. 538

50 Ind. 516

Some things prima facie nuisances, for example, slaughter houses.

2 Johns Chanc. 162

37 Iowa 540

Injunction used to prevent interference with riparian rights.

2 Johns Chanc. 162 (Case Book 758)

40 N.Y. 191

137 Mass. 163

110 N.Y. 273

The injunction is extensively used in connection with patent right litigation. But is only issued after the validity of the patent has been established and after the question of infringement has been adjudicated upon.

High on Injunctions, para 934-9

Pomeroy, vol. 3, 1352

-----oOo-----

Jan. 23th, 1904.



## LECTURE XXVII.

-----oOo-----

At the close of the last lecture I was discussing the use of the injunction in connection with patent litigation. I think I had finished all I had to say upon the subject, but these principles should be borne in mind, that an injunction will never be allowed by the United States Courts to restrain the infringement of a patent where there is an substantial doubt as to the validity of the patent or as to the infringement. Those questions must be settled before making an application for the injunction. Those things may be settled by admissions in the pleadings, but if there is some doubt as to the validity of the patent or some doubt as to its infringement, the court will always withhold the injunction until they have been settled at law.

The rule as to trade marks and copyrights is substantially the same as that in regard to patent rights. The trade mark that has become property, either by virtue of use, or by registration may be protected by the injunction.

There is one class of cases that does not fall under either head that I have suggested. A class that is becoming of considerable importance in these days of new business ventures. I refer to cases that arise under trade names. A person may assume for trade purposes a certain name--not a name which will give him a property right in it, not a name that will give him a trade mark, still a name that will give him a property interest in the use of the name that will be protected by an injunction.

You will find a striking case illustrative of this class of cases in the 109 Calif. 529. Here the plaintiff had built up a large business on the Pacific Coast, with their central store in Sacramento, which was designated as the 'Mechanic's store'. It had a peculiar style of architecture. It had an unique way of doing business and attracting customers which proved very successful, and so the defendant built a store and began to do business in the same way. There was no objection to this for it was legal competition, but the defendants went farther than this, they finally secured a plot of ground next to the plaintiff's place of business and erected a building thereon of the same size and style of architecture. And the arrangement of the goods in the windows was patterned after those of the complainant, so that a customer would not know when he was in complainant's or defendant's store. This store was called the 'Mechanical Store'. An injunction was brought to restrain the defendant's in the use of the term 'Mechanical Store'. The lower court issued the injunction and required the defendant's to put up statements both inside and outside of their store indicating the proprietorship of the store. The court above sustained the lower court. This action was taken upon the theory that the facts of the case indicated a conspiracy on part of the defendant to cheat



and defraud the plaintiff and improperly take away his trade.

## DICTATION

The improper infringement of trade marks may be restrained by the injunction.

Pomeroy's Equity, Vol. 3, para. 1354

Property rights in a trade name will be protected by an injunction, particularly when the name or its equivalent is assumed for the purpose of deception, and the case is accompanied by other inequitable acts.

109 Calif. 549 (Case Book 774)

-----

There is another class of cases in which the injunction has been extensively used in recent years. I refer to Labor Cases. Although the question has come to be largely a political one, still there is a legal side of great importance. This is a question upon which extreme views have been taken by some of our courts, particularly by some of the Federal courts. But there are some conservative views that are sustained by the weight of authority. The theory upon which an injunction is allowed in this class of cases is that by virtue of the combination property rights are invaded or property rights are threatened,--not that the criminal law has been violated. Now has equity a right to assume jurisdiction where the facts show that there is a simply combination by the defendants for the purpose of protecting their interests? It may be for the purpose of preventing a cut in wages or for the purpose of securing an increase in wages. Combinations of this kind are perfectly legitimate. But where the combination goes farther and injury results to property rights or where it goes so far as to threaten injury to property rights or injury to the person, equity may restrain the proceeding by injunction. In these cases it often becomes a difficult question to determine whether a combination has passed the danger line. It is objected that where a crime has been committed through this combination that equity is usurping criminal jurisdiction by issuing an injunction to restrain the further continuance of the combination. But courts of equity make this distinction: they say that altho there may have been a crime committed, still there is a civil jurisdiction over property rights which have been invaded. If you can show an invasion of such rights, the court will be justified in granting an injunction.

This matter is quite well stated by the court in the case of





131 Mo. 212( Case Book 771)

The defendants have appeared by their counsel, and, by their demurrer, filed, admit that all the statements of the amended petition are true; but they take the position that, even if they are doing the unlawful act that they are charged with doing, still this court has no right to interfere with them because they say what they are doing is a crime by the state law of this state, and that for the commission of a crime they can only be tried by a jury, in a court having criminal jurisdiction. It will be observed that the defendants do not claim to have the right to do what the injunction forbids them from doing. Their learned counsel even quotes the statute to show that it is a crime to do so. But he contends that the Constitution of the U.S. and the constitution of the state of Mo. guarantee them the right to commit crime, with only this limitation, to-wit, that they shall answer for the crime, when committed, in a court of criminal jurisdiction before a jury. But if that position be correct, then there can be no valid statute to prevent crime. But this position is contrary to all reason. The right of trial by jury does not arise until the party is accused of having already committed the crime. If you see a man advancing upon another with murderous demeanor and with a deadly weapon, you arrest him, - disarm him, - have perhaps prevented an act which would have brought about a trial by jury, but can you be said to have deprived of his constitutional right of trial by jury? The train of thought put in motion by the argument of the learned counsel leads only to this end, to-wit: that the constitution guarantees to every man the right to commit crime so he may enjoy the inestimable right of trial by jury.

#### DICTATION

The injunction may be used in connection with labor combinations to prevent the invasion of private rights or interests. Court, however, has no jurisdiction to issue the injunction where the act complained of is simply a criminal one unconnected with property.

147 Mass. 212( Case Book 716)

167 Mass. 92 (Case Book. 770)

I come now to a consideration of the use of the injunction in connection with the restraint of trade libels. That is where a third persons injures another by circulating libelous statements concerning the conduct of his business.

According to the recent English decisions an injunction may issue for that purpose.

But the courts, almost without exception, in this country, deny the right of equity in this connection. But we have cases which fall very near to this line in which equity has assumed jurisdiction, although at first blush these cases would seem to be a libel upon business. This is very well illustrated in the Grand Rapids case in the 92 Mich. 558.



DICTATION

Equity will not by the injunction restrain liebls upon business unless those liebls go to the extent of a conspiracy.  
p2 Mich. 558( Case Book 744)

To prevent a single trespass equity will not interfere by injunction, but will interfere where the trespass will be continuous in its nature, or where the injury will be such that it cannot be compensated in damages, as, for example, where shade and ornamental trees are cut down.

39 Wis. 160 ("82

64 Vt. 643 (Case Book 753)

108 N.Y. 179' Case Book 755'

Courts of equity will restrain proceedings at law by injunction wherever the defendant in the law proceedings must depend upon an equitable defense, and whenever he is entitled to some one of the remedies that are distinctly equitable, and also where his defence is affirmative and equitable in its nature. When the injunction issues the whole proceeding is transferred to the equity side of the court.

43 Mich. 309

37 Mich. 533

16 Ga. 398

27 N.J. Equity 247

44 Vt. 450

-----oOo-----

Feb. 1st, 1904.

---:F I N I S :---



# EQUITY JURISPRUDENCE. SR.

## --I N D E X :--

-----oOo-----

### -A-

Accident	page
Definition of	1
Story's definition	1, 2
Adequate remedy at law	2
Ademption of legacies	16
Acquiescence	74
Action to set aside fraud must be brought as soon as discovered	91
	36

### -B-

Bequest	16
	52

### -C-

Conscientious right	2
Cases in which equity will infer fraud	27
Cases in which equity will interfere on the ground of accident	5
Check	6
Cancellation	10, 19
Contracts	39
Fiduciary	39
Insurance contracts	39
Codicil	77

### -D-

Dower	52
Duty to disclose	37
of vendee	37
of vendor	39
Donor	53
Duress	58
Devise	52

### -E-

Equitable rights or grounds of relief in equity	2
Election	51
Kinds of	54
Express and	54
Implied	54



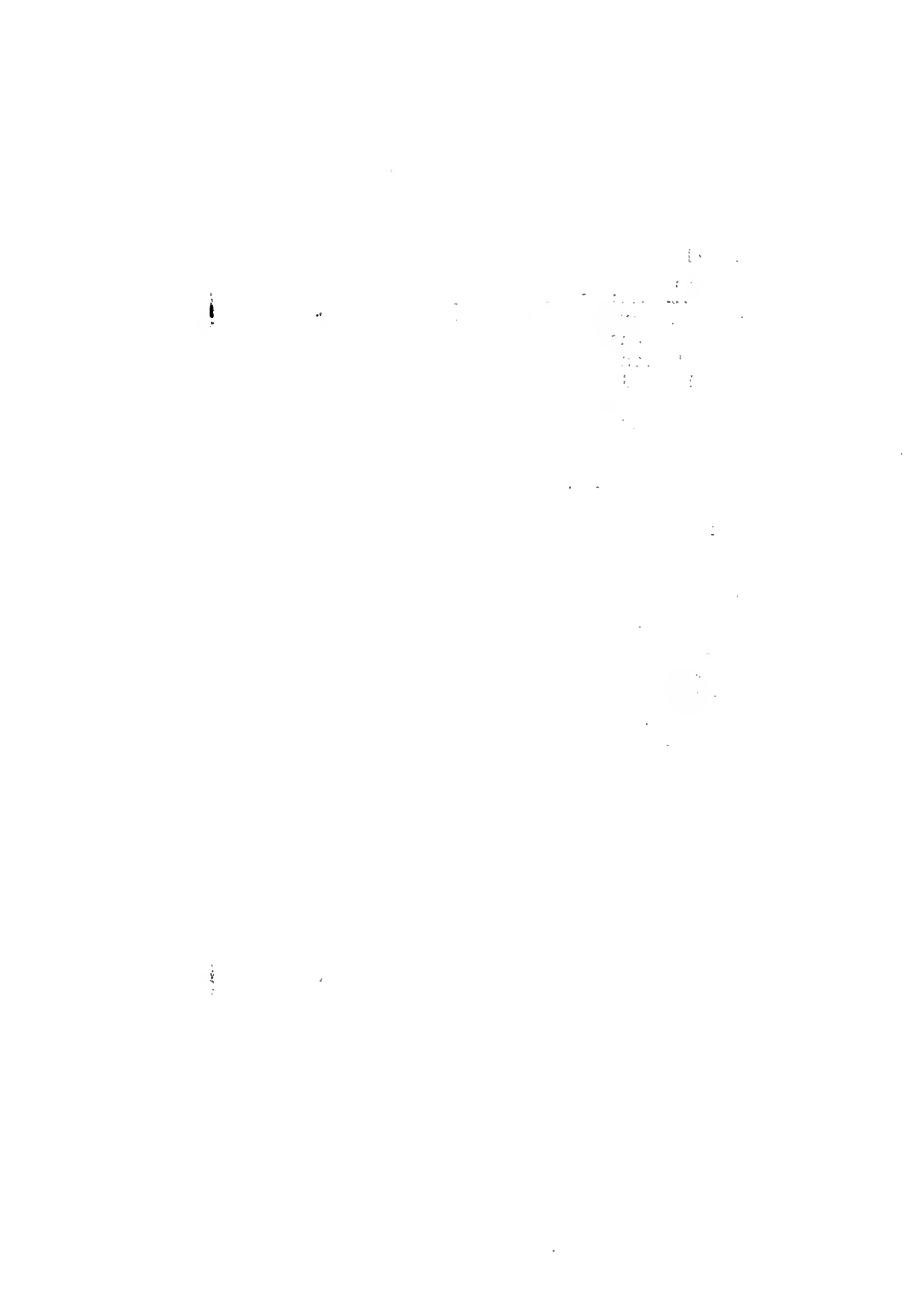
	page
Equitable estoppel	78
Essentials of,	85
Must be of material fact	86
Must be of present or past fact	86
Must be certain	87
Must be taken in its natural sense	87
Cannot be enlarged	87
Estoppel by words and conduct	90
Fraud as an essential to	83
Equitable estates	83

-F-

Fiduciary relation	33
Fraud	23
Fraud in Equity	27
Divided into	27
Actual and	27
Constructive	29
Actual fraud consists of	29
False representations	29
Fraudulent concealment	31
False representation,	31
Essential elements of	31
Affirmation of fact	31
With intent to induce action	31
Must be untrue	31
Knowledge and belief	34
Must have been relied upon	32
Must be material	31

-I-

Injunction	95
Definition of	96
Kinds of	96
Interlocutory and	96
Final	96
Prohibitive and	96
Mandatory	96
Injunction Bill	96
Cannot be granted where the relief at law is adequate	98
May be granted where the remedy at law is inadequate	
May be used to restrain the violation of contracts under certain circumstances	100





	page
May be used to restrain the commission of tort	103
To restrain negative covenants in deed and leases	103

-I-

Introduction	1
Intent of parties	10
Investigation in cases of false representation	41
Inadequacy of consideration	45
Insanity	46
Intoxication	94
Incidental and collateral matters	94
Married women	94
Infants	94

-J-

Jurisdiction	26
--------------	----

-L-

Legislative conduct, contracts controlling, etc.	44
Lobbying contracts	44

-M-

Mere power	3
Mistake	7
Definition of	8
May be divided into	
Mistake of Fact	9
Mistake of Law	9
As to general law	9
As to Particular transactions	9
Mistake of Fact	8, 15
Definition of	16
Mistake must be	16
In regard to a material fact	16
Not brought about by the negligence of party	16
Rule in showing mistake of fact	18
How accident, mistake, etc., may be shown	17
Remedy in case of mistake	17, 18

-O-

Official conduct	43
------------------	----

-P-

Parol evidence	
----------------	--



## Page

Personalty	65
Pecuniary distress	46

## -R-

Reformation	10
Remedies, equitable	35
Reformation	35
Cancellation	35
Specific enforcement	35
Relation from which fraud will be inferred	46

## -S-

Specific Performance	19
Specific Performance and Reformation	20
Special heads of equity jurisdiction	51
Statutory provisions	62
Satisfaction	66
Satisfaction of Legacies by subsequent legacies	66
Satisfaction of debts by legacies	66
Satisfaction of portions by legacies	66
Satisfaction of legacies by portions	66

## -T-

Trustee	59
---------	----

## -U-

Usurious contracts	42
--------------------	----

## -V-

Voluntary power	7
-----------------	---

## -W-

Warranty	59
Widow	59



L E C T U R E S

O N

EQUITY   PLEADING   AND   PRACTICE.

B Y

PROF. BRADLEY M. THOMPSON, M.S., LL.B.

-----  
Written from Manuscript.

-----  
U N I V E R S I T Y   O F   M I C H I G A N .

Law class of 1904.

-----  
Edwards Bros.-----Publishers,

Ann Arbor, Mich.

-1903-



# EQUITY PLEADING AND PRACTICE.

## C H A P T E R I.

-----

### SUIT IN EQUITY.

A suit in Equity is commenced by filing in the court having jurisdiction of the cause, a bill, or petition, setting forth in a full, clear and methodical manner the facts and circumstances upon which the complainant bases his claim for aid and relief, and praying that he may be given such specific relief as he believes he is entitled to or such general relief as is agreeable to equity and good conscience. The bill, or petition, in equity takes the place of a declaration at common law. The party who commences the suit is called the complainant, or plaintiff, and the party against whom the suit is brought is called the defendant. The bill of complainant is not entitled, because there is no suit pending until the bill has been filed. All subsequent papers and proceedings are entitled in the court and cause; for example, if John Doe files a bill of complaint against Richard Roe, in the Circuit Court for Wayne County in Chancery, the defendants answer would be entitled as follows:

The Circuit Court  
For Wayne County,  
In Chancery.  
John Doe,  
Complainant,  
vs.  
Richard Roe,  
Defendant.

### PARTS OF A BILL.

The form of a bill in equity is not due to any statute, but to the practice of the court and has been established by long usage. It was formally supposed that a bill of complaint contained nine parts, and, although at no time were they all essential, and some of them have been superseded by the rules of court, it is still desirable that the student should be familiar with the old division. These parts consisted of: 1. Address; 2. Introduction; 3. Premises or stating part; 4. Confederating part; 5. Charging part; 6. Clause of Jurisdiction; 7. Interrogating part; 8. Prayer for relief; 9. Prayer for process.





## I. ADDRESS OF THE BILL.

The bill of complainant is addressed to the Judge or Judges of the Court in which the suit is commenced.

In England the bill was addressed to the Lord Chancellor or other person having for the time the custody of the great seal. In a circuit court of the United States: "To the Judges of the Circuit Court of the United States within and for the District of ....., sitting in equity." In this state the bill is addressed: "To the Circuit Court for the County of ....., in Chancery."

## II. THE INTRODUCTION.

After addressing the court, the complainant introduces himself. This part of the bill should contain the name and residence of the complainant. And if he brings the suit in a representative capacity, for the use and benefit of a third person, he should so inform the court. The residence of the complainant must be given to enable the defendant to resort to the complainant for his costs or to enforce compliance with any order that may be made by the court during the progress of the proceedings.

## III. STATING PART.

This part of the bill should contain a full narrative of all the facts and circumstances of the complainant's case. It is upon this part of the bill that he must ground his right to relief. It must show that the court has jurisdiction to hear and determine the matter in controversy and assuming that the statements made are true, that the complainant is entitled to the aid and assistance of the court. The testimony necessary to establish the facts stated is not to be set out, but the facts themselves must be affirmed, that the complainant may introduce his proof, for no evidence will be considered by the court not having reference to some fact put in issue by the pleadings. The complainant is not required, however, to set forth any fact of which the court is bound to take judicial notice. Facts are to be stated, not conclusions of law.

## IV. CHARGE OF CONFEDERACY.

This part of the bill charges that the defendants intending to injure and defraud the complainant have, with divers other persons, at present unknown to the complainant, but when known he prays may be made defendants to his bill, confederated and combined together for the purpose of injuring and defrauding him of his rights. This clause is never necessary unless there has been, in truth, an actual conspiracy upon which fact the complainant relies as making a part of his case. It is said to have arisen from a two-fold error; first, that parties could not be added to the bill by amendment, whereas there never was a time when this could not



have been done; and, second, that an allegation of a confederacy would be sufficient of itself to sustain the jurisdiction of the court, but a simple confederacy and combination was never sufficient to give the court of equity jurisdiction.

#### V. CHARGING PART.

This part of the bill alleges the pretences which it is supposed that the defendant will make as his defence to the case made by the complainant in the stating part of his bill. It is used for the purpose of obtaining a discovery of the defendant's case, or to put in issue some matter which it is not for the interest of the complainant to admit. The example given by Lord Redesdale (Mitford's Pl. and Pr. in Eq. 36) is as follows: He states the case of an heir filing a bill upon any equitable ground, who apprehends that his ancestor has left a will. He may state, by way of pretence, that the defendant claims under such will, and thus make it a part of his case, without admitting it; and the heir then denies the existence or due execution of the will and charges that it is fraudulent. Under the rules of the supreme court and those of most of the states retaining chancery practice, this portion of the bill may be inserted in the stating part or altogether omitted.

#### VI. AVERMENT OF JURISDICTION.

This clause avers that the acts complained of are contrary to equity, that the complainant has no remedy at law and can only obtain relief in a court of equity. This averment was intended originally, apparently, to give the court jurisdiction, but it no longer answers that purpose, if it ever did. No mere assertion of the complainant will give the court jurisdiction. If the facts and circumstances set forth in the Stating Part do not make a case coming within the jurisdiction of the court, the suit will not be entertained, and if they do, the court will entertain the bill without any allegation on the part of the complainant that the court has jurisdiction to hear and determine the matter and ought so to do. This clause seems, therefore, equally nugatory with that of confederacy.

#### VII. INTERROGATING PART.

The bill having up to this point been drawn with a view of showing that the complainant is entitled to relief and that the court has jurisdiction to grant such relief, now prays that the defendants may answer all the matters therein set forth, not only according to their positive knowledge of the facts stated, but also according to their remembrance, the information they may have received, and the belief they have been able to form on the subject. At the first this clause closed with a general prayer, that the defendants may answer, etc., that being supposed sufficient to procure the discovery sought for. But it was soon found that



the ingenious solicitor could answer in such general terms that the substance of the question would not be touched. To meet this difficulty it soon became customary to set out special interrogatories covering every specific fact material to be answered, and also all facts and circumstances surrounding the main fact. The defendant, however, cannot be interrogated as to any fact not charged in the bill. He is simply required to answer the complainant's case and these interrogatories are to enable him to do so fully and fairly. He is not required to do more than that, therefore he may refuse to answer any interrogatory the answer to which would not be responsive to some fact charged in the bill.

Since in most of the states parties may be examined as witnesses, it is customary now, in most cases, to expressly waive an answer under oath, and to omit interrogatories altogether.

#### VIII. PRAYER FOR RELIEF.

The prayer for relief is usually, first, a special prayer for the particular relief that the pleader thinks he is entitled to, and then a prayer for general relief, so that should the court refuse to grant the specific relief asked, the complainant may obtain such relief as the court thinks he is entitled to. It is never safe to omit a prayer for general relief. Indeed, unless the plaintiff asks for an injunction or a writ of ne exeat, the prayer for general relief is sufficient to entitle him to such a decree as his case merits, provided the relief asked for at the hearing is authorized by the facts stated in the bill. If an injunction or a writ of ne exeat is desired, it must be specially prayed for.

#### IX. PRAYER FOR PROCESS.

The bill in the last place prays that a writ of subpoena may issue requiring the defendants to appear and answer the matters alleged against them, and abide the determination of the court on the subject. The prayer for process in the bill should contain the names of all the defendants, and if any of them are known to be infants under age, or otherwise under guardianship, that fact should appear so that the court may take order thereon as justice may require. When a corporation is made defendant, the bill should pray that it appear according to law. If an injunction or a writ of ne exeat is desired, there must be a special prayer therefore, and it must be also asked for in the prayer for process.

These nine parts of the bill in chancery I have given you because you will find them given in all the text-books, and much that has been written upon equity pleading and practice could not be clearly understood without a knowledge of these old divisions of the bill, but you will bear in mind that the "Confederating," "Charging," "Jurisdictional," and "Interrogating" parts, numbers 4, 5, 6 and 7 are no longer essential.



## JURAT AND SIGNATURE.

The bill of complaint need not be signed by the complainant but it must be signed by the solicitor. Certain bills, bills for divorce and those asking an injunction, for instance, must be sworn to.

Chancery, rule two of this state, prescribes that the oath administered to the party shall be in substance as follows: "That he has read the bill, or heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon information or belief, and as to those matters he believes it to be true, and that the substance of the oath shall be stated in the jurat."

Chancery, rule one of Michigan, requires every bill of complaint to be divided into paragraphs numbered consecutively, and that each paragraph shall contain, as near as may be, a separate and distinct allegation. When there is no such specific rule the bill need not be divided into paragraphs, but the practice is to be commended as it permits a ready reference to any part of the bill in case of amendment or upon the argument. The statute of this state requires that all pleadings and proceedings shall be fairly and legibly written. In entitling and endorsing papers, made by either party, the complainant's name must be placed first. At least one copy of the bill should be made and retained as an office copy.

## BRINGING THE DEFENDANT INTO COURT. SUBPOENA AND SERVICE.

Since every one is entitled to his day in court and must be given an opportunity to defend his rights of person and property, the next step is to obtain service upon the defendant. The pleader, therefore, having carefully prepared the bill files it with the Register of the Court and obtains a subpoena. Formerly a subpoena might issue before the bill was filed but now under the U. S. rules and the rules of this state the bill must first be filed. In this state a subpoena issues as a matter of course but in the United State court a præcipe must be filed with the clerk. (U. S. rules 7, 11, 12. Mich. rule 1.)

The subpoena is a writ under the seal of the court directed to the defendant requiring him to appear on a day certain and answer the bill. Under rule 12 of the Supreme Court of the United States the names of all the defendants may be entered in the same subpoena, or, at the election of the complainant, separate subpoenas may be sued out for each defendant, except that the names of husband and wife must appear in the same subpoena. Under the Michigan rules the subpoena must contain the names of all the defendants. It must be signed by the Register and endorsed with the name of the solicitor. (Mich. rule 4.)

## FORM OF SUBPOENA.

The present form of the subpoena in Michigan differs materially from the old form. At first the defendant was required to appear under penalty (sub poena) of being fined a





certain sum, \$1,000. Hence the name of this writ. Now the rules provide that unless he appear, his default will be entered for not appearing and the bill taken as confessed and he will thus be deprived of making any defense. The following is the present form of a chancery subpoena in this state. It is entitled on the back so that when it is properly folded the title will appear on the outside.

STATE OF MICHIGAN,  
The Circuit Court for the County of \_\_\_\_\_, : SS  
IN CHANCERY. :

In the Name of the People of the State of Michigan:

XxxxxxxxX To.....  
x Seal x  
XxxxxxxxX .....  
..... Greeting:

You are hereby notified that a Bill of Complaint has been filed against you in the Circuit Court for the County of \_\_\_\_\_ in Chancery, by.....  
..... as complainant..., and that if you desire to defend the same you are required to have your appearance filed or entered in the cause, in accordance with the rules and practice of the Court, in person or by solicitor, within fifteen days after service of this Subpoena upon you. Hereof fail not under the penalty of having said bill taken as confessed against you.

The return day of this writ is the .....day of .....  
A. D. 190..

WITNESS, the Hon..... Circuit Judge,  
at.....this.....day of.....A.D. 190...  
.....Register.  
.....Solicitor for Complainant.

The day upon which the subpoena may be made returnable is fixed by rule. Michigan rule 4 a. provides that it shall be made returnable on a day certain (except Sunday) not less than ten days from the issuing thereof. The subpoena is to be served on or before the return day by delivering to the defendant a copy by complainant's solicitor and inscribed copy, showing the original, under the seal of the court, at the time of such delivery, to the defendant. Rule 4. b. It may be served in any part of the state. The service need not be made by an officer of the court, but if made by an individual, such service must be shown by affidavit. If it is made by an officer, he makes his return of service on the subpoena.



## RETURN OF SERVICE.

STATE OF MICHIGAN, :  
COUNTY OF \_\_\_\_\_ : SS

I HEREBY CERTIFY AND RETURN, that, on the .....day of  
.....A. D. 190...., at.....I served  
the within Subpoena personally, on .....  
.....defendant....named in said Subpoena, by then and there,  
at the place...and on the date...above mentioned, delivering to  
said above named defendant.....a true copy of the said  
Subpoena, inscribed "copy" and subscribed.....  
.....Complainant's Solicitor...., and by  
showing at the same time to the said above named Defendant.....  
.....the said Subpoena, with the Seal of the Court impressed  
thereon.

Dated.....A. D. 190.... Sheriff.

When the subpoena has been properly served, the defendant is bound to appear and answer the charges preferred against him in the bill, within the time limited by the practice of the court. Appearance is the formal proceeding by which the defendant submits himself to the jurisdiction of the court, and it is necessary in every case before a decree can be rendered against him that he appear. Formerly when the defendant did not voluntarily appear after being served with a subpoena, a number of successive processes were resorted to, ending in a sequestration of his property, for the purpose of compelling an appearance. At the present time in all the states there are statutory enactments making the process of the courts more effectual, and providing under certain circumstances that the appearance of the defendant may be entered by an order of the court and the bill taken pro confesso. Process for effecting the compulsory appearance has fallen into disuse since the enactment of these statutes. Only one is in use in this state--attachment--and that is only resorted to when the answer of the defendant is essential to the complainant.

Under the Michigan practice a defendant desiring to defend a cause, or to have notice of the proceedings therein, shall cause his appearance to be filed or entered in the office of the Register of the court within fifteen days after service of the subpoena upon him and within the same time shall serve upon the complainant's solicitor notice of such appearance. (Rule 5. a. b.)

Such notice shall be entitled in the cause and addressed to the solicitor and may be in the following form:

"Take notice, that the defendant,....., hereby appears in the above entitled cause and demands a copy of the bill of complaint therein.

Dated.....

Yours, etc.,

\_\_\_\_\_  
Solicitor for Defendant.



The practice in the United States Court is regulated by Rules 2, 11, 12.

If the defendant does not appear within the time prescribed and give notice of such appearance, the complainant may enter or file an order entering the defendant's appearance and also taking the bill as confessed. (Rule 7.) Before such step is taken by the complainants, proof should be filed showing that he has a right to such order. The returns of the officer making the service of the subpoena is sufficient proof of that fact. Proof of non-appearance may be made by affidavit.

After the defendant's default has been entered and the bill taken, pro confesso, the suit then proceeds ex parte.

#### DEFENDANT'S DEFENSE.

If the defendant desires to make a defense, he appears in person by solicitor or in person and under the rules in this state he can demand a copy of the bill of complaint and he has fifteen days after receiving the copy to make his defense. The character of his defence will depend upon the nature of the case made in the bill, and is either by disclaimer, by demurrer, by plea, or by answer. All of these several defences may be joined, if some one of them is the appropriate defence to some part of the bill.

#### DISCLAIMER.

If the defendant has no interest in the subject matter of the suit, he may avoid the plaintiff's claim by a disclaimer, which is a renunciation on his part of all interest or claim in the subject-matter of the plaintiff's claim. Upon filing the disclaimer the plaintiff will be entitled to a decree against the defendant. Whether the defendant will or will not be entitled to costs will depend upon whether or not it is his fault that he was made a party to the bill.

#### DEMURRER.

If on the face of the bill, the complainant is not entitled to the relief prayed for or any portion of such relief, for any reason, either due to facts stated or on account of omissions or other defects, the defendant may demur. The demurrer admits the truth of all facts well pleaded and submits to the court the question, whether or not the defendant shall be required to make any further or other answer.

#### FORM OF DEMURRER.

In the demurrer the defendant protests that the allegations of fact contained in the bill are not true, but says if they were true, and assuming them to be true, the plaintiff is not entitled to any relief, and craves the judgment of the court whether he shall be required to make any further answer. A general demurrer for want of equity may be in the following form:



TITLE

The demurrer of Richard Roe, the defendant, to the bill of complaint of John Doe.

This defendant by protestation, not confessing any of the matters, in and by said bill complained of to be true in manner and form, as the same are set forth, says that he is advised that there is no matter or thing in said bill, good and sufficient in law, to call this defendant to account, in this honorable court for the same; but that there is good cause of demurrer thereto, and he does demur accordingly and for cause of demurrer says, that the bill, in case the same are true, contains no matter of equity whereon this court can ground any decree, or give the complainant against this defendant. Wherefore, and for divers other errors in said bill contained and appearing on the face thereof, this defendant does demur thereto, and humbly craves the judgment of this honorable court, whether he is compellable, or ought to make, any answer thereto otherwise than as aforesaid. And this defendant prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained. A. B. Solicitor for Defendant.

The demurrer tenders an issue of law and if decided in favor of the defendant, that is, if the demurrer is sustained, the complainant must amend his bill or the bill will be dismissed. If the demurrer is overruled the defendant must answer.

The demurrer may be to the whole bill or to some portion of the bill

## PLEAS.

If the defendant cannot demur there may be some defect in the complainant's case, which does not appear upon the face of the bill, that constitutes a special defence to his recovery, it may be taken advantage of by plea. A plea is defined as a special answer, showing or relying upon one or more things, as a cause why the suit should be either dismissed, delayed or debarred; it does not, like a demurrer, rest on facts charged in the complainant's bill, but alleges other facts, to which the complainant may reply. The office of the plea is to bring forward a fact which, if true, displaces the equity of the bill.

Pleas are divided into three classes:

1. Pure or Affirmative.
2. Negative.
3. Anomalous.

If the special defence relied upon is some fact not appearing on the face of the bill, it is called a Pure or an Affirmative plea. If it is the non-existence of some fact affirmed in the bill and essential to the plaintiff's right of action, it is called a Negative plea. If it is a fact admitted in the bill but which the complainant seeks to nullify and destroy by alleging that its existence is due to the deceit or fraud of the defendant, and the defendant desires to rely for his defence upon such fact, he may affirm its existence and deny the fraud or deceit charged. Such a plea is called an Anomalous plea.





Pleas have also been arranged in four classes:

1. To the jurisdiction.
2. To the person of the plaintiff.
3. To the bill or the form thereof.
4. In bar.

The form of a plea, like that of a demurrer, commences with a protestation against confessing the truth of any matter in the bill. It should distinctly show whether it goes to the whole bill or only a part of it. The defendant's grounds of objection to the jurisdiction of the court, the person of the plaintiff or in bar of suit, must be supported by averments, so clear, positive and distinct of every fact and circumstance essential to render it a complete equitable bar, that the complainant may be enabled to take issue upon its validity.

1. A plea to the jurisdiction does not dispute the right of the complainant in the suit, but asserts that his claim is not a fit subject of cognizance in a court of equity, or, that some other tribunal is vested with the proper jurisdiction. Most jurisdictional defects can be reached by a demurrer; but the truth may not appear on the face of the bill. For instance, the Circuit Court of the United States has no jurisdiction to hear and determine causes between citizens of the same state, and if the bill should allege that the complainant and defendant were citizens of different states, the fact that they were citizens of the same state could only be contested by the defendant by a plea to the jurisdiction. The plea must contain something more than a mere allegation of a want of jurisdiction, jurisdiction will be presumed unless the specific fact is pointed out which deprives the court of jurisdiction.

2. A plea to the person merely disputes the right of the complainant to sue; for instance, that he is an infant, an idiot or a lunatic.

3. The usual plea to the bill or the frame of the bill are either: (1) the pendency of another suit for the same matter in another court of equity, or, (2) the want of proper parties to the bill.

4. Pleas in bar are, (1) pleas founded on some bar created by the statute. The most usual of this character are the statute of limitations and the statute of fraud. (2) Pleas founded on matter of record, that there has been a judgment at law of a court of record between the same parties for the same cause of action, or a final decree or order of a court of equity in a suit between the same parties and for the same subject matter. (3) Pleas of matter in pais are pleas of stated account, of a release, of a purchase for valuable consideration without notice, etc.

The rules of the United States Courts and the Michigan rules require that the plea shall not be filed except upon the certificate of counsel that in his opinion it is well founded in point of law and supported by the affidavit of the defendant stating that it is not interposed for delay merely and that he believes it to be true in fact. (U. S. Rule 31; Mich. Rule 8. a.)



## FORM OF PLEA.

When another suit is pending for the same cause of action the plea may be in the following form:

TITLE

The Plea of Richard Roe, the defendant, to the Bill of Complaint of John Doe.

This defendant, by protestation not confessing any of the matters in said bill contained to be true in manner and form, as the same are therein set forth does plead thereunto, and for cause of plea says, that heretofore, and before complainant exhibited his present bill in this Honorable Court on the 9th day of February, 19\_\_, the said complainant did exhibit his bill of complaint in this Honorable Court, against the said defendant for the same matters and to the same effect and for the like relief, as the said now complainant doth by his present bill demand and set forth: to which said bill this defendant did put in his answer, and the said complainant thereunto did reply; and other proceedings come thereupon had, and the said former bill is still pending in this Court, and the matters thereof undetermined; and, therefore, this defendant doth plead the former bill, answer and proceedings, in bar to the present bill; and humbly prays the judgment of this honorable court, whether it behooves him to make another or further answer thereto than as aforesaid, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

A. B. Solicitor for Defendant.

Richard Roe

The plea must be signed by the solicitor for the defendant. In fact, all papers filed by either party must be signed by the solicitor of the party in whose behalf the same are filed. The plea must be signed by the defendant and must be verified in all cases where the answer must be made under oath.

The plea, unlike the demurrer, does not tender an issue, either of law or fact. If the defendant, assuming that the statements of fact in the plea are true, believes that they do not constitute a sufficient defense, he notices the plea for argument; such notice having the effect of a demurrer to the plea. The only question presented in such argument is the sufficiency of the plea. If the Court sustains the plea, finds it good in form and a valid and sufficient defence, the complainant may put in issue the truth of the plea, by filing a replication.

## FORM OF REPLICATION.

TITLE : THE REPLICATION of  
: John Doe, complainant to the plea  
: of  
: Richard Roe, defendant.

This Repliant saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage



of exception which may be taken to the manifold insufficiencies of the said plea for replication thereunto, says that he will aver, maintain and prove his Bill of Complaint to be true, certain and sufficient in the law, to be answered unto; and that the said plea of defendant, Richard Roe, is uncertain, untrue and insufficient, to be replied unto by this Repliant without this, that any other matter or thing whatever, in the said plea contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this Repliant is and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray as in and by his said bill he has already prayed.

A. B. Solicitor for Complainant.

The replication admits that the plea is good in form and substance and puts in issue the truth of its allegations of fact, and the parties proceed to take proofs the same as when a replication is filed to an answer.

If upon argument the plea is overruled the defendant must answer, and in default of his answering the bill, or, so much thereof as was covered by the plea, will be taken pro confesso.

If upon argument the plea is allowed the complainant may be permitted to amend his bill. In case the bill is not amended and no replication is filed to the plea, the bill, or so much as was covered by the plea, will be dismissed.

If upon an issue of fact, the facts stated in the plea are determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

If upon an issue of fact the facts are determined for the complainant, the effect shall be the same as though the bill or so much thereof as is covered by the plea was taken pro confesso.  
(U. S. Rules 33, 34; Mich. Rule 8.)

#### ANSWER.

If there is nothing in the bill of the complainant to which the defendant is able or willing to demur; and if he have no extrinsic matter, which he can offer by way of plea; or if his plea or demurrer has been overruled, he may proceed to controvert the claims of the plaintiff by filing an answer to the bill. The answer need have no particular form as to that part which sets forth the defendant's case. It is usually drawn so as to admit in the first instance all the allegations contained in the complainant's bill which are true, and then follow denials of all the allegations made which are in dispute. If there are any statements in the bill upon which the defendant has no knowledge or information, he states that fact and leaves the complainant to his proofs. Then follows a statement of all facts and circumstances constituting the defendant's defense. If the bill contains interrogations, each interrogatory is to be answered separately and the answers numbered to correspond with the numbers of the interrogatories. When the defendant submits to answer at all, he must make



a full, frank and explicit answer as to all matters material or necessary to be answered, resting within his own personal knowledge, or upon information and belief.

## FORM OF ANSWER.

TITLE

The Answer of Richard Roe, defendant, to the Bill of Complaint of John Doe, complainant.

This defendant, now and at all times hereafter, reserving all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereto, or unto so much, or such parts thereof as this defendant is advised is material for him to make answer unto, he answers and says:--(here follows an answer to each of the paragraphs of the bill of complaint and an answer to each one of the interrogatories. This is followed by a full and clear statement of the defendant's defence and closes with the formal statement):--

This defendant denies all unlawful combination in said bill charged without this that any other matter or thing material for him to make answer to, and not herein sufficiently answered, avoided or denied, is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready to aver and prove as this Court shall direct, and prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

A. B.

Richard Roe.

Solicitor for Complainant.

The answer must be signed by the defendant and must be sworn to, unless his answer under oath is waived in the bill.

Neither a sworn answer nor a sworn bill in Michigan has the force of evidence except as to admissions, and except upon the hearing of motions and petitions. (Rule 10.) At common law a sworn answer was evidence.

The answer should be divided into paragraphs, each containing a separate and distinct allegation. This is required in Michigan. (Rule 10.)

The answer, like the plea, does not tender an issue either of law or fact.

If the complainant conceives that the admissions in the defendant's answer are alone sufficient to entitle him to such a decree as he desires he may set down the cause for hearing upon bill and answer.

The complainant does not demur to the answer in such a case, but simply notices the case for hearing upon bill and answer.

If the discovery contained in the answer is incomplete, or the allegations contained in the bill are insufficiently replied to, the complainant may prefer exceptions to the defendant's answer and require it to be more full and particular. The exceptions must be in writing and signed by counsel, and they must also state with precision and accuracy, the points in which the





defendant's answer is defective, or they will be rejected as vague and impertinent. Care must be taken also to omit no point to which an exception would lie, as the rules of the court do not permit any others to be afterwards added. It may be stated generally that any answer will be considered insufficient in which the defendant does not fully respond, according to the best of his knowledge, remembrance or belief, to every material allegation, charge or interrogatory in the bill.

When exceptions are taken to the insufficiency of the answer and the defendant does not amend his answer, the exceptions are referred to a master, who is directed to report whether the answer is sufficient in the points excepted to or not. If the master reports it to be insufficient, the defendant must submit to answer more fully, unless by exceptions to such report of the master, he appeals to the judgment of the court, and obtains a determination in his favor.

The practice of taking exceptions to the answer has been abolished in Michigan. Rule 10 f. provides that all objections to an answer heretofore raised by exception shall be disposed of by the court on special motion.

If the complainant does not desire to have a fuller answer and cannot with safety go to a hearing upon bill and answer, he files a replication to the answer, which puts in issue all the facts set up therein. The form of the replication to an answer is the same as that to a plea, except that the word answer is substituted for plea.

#### INTERLOCUTORY PROCEEDINGS.

During the progress of a suit in equity it frequently becomes necessary to make what are known as interlocutory orders and decrees. The most important and usual are those which relate to amendments of the pleadings, the appointment of a receiver, payment of money into court, issue of an injunction and reference to a master. These orders are made by the court upon motion made orally or upon petition in writing.

#### AMENDMENTS.

In a court of equity matters of form are never suffered to prejudice the rights of a party; and the liberty of an amendment, often upon condition, however, is allowed to all kinds of pleading. If the bill has not been sworn to, under the rules in this state, the complainant can amend, of course, without the payment of costs, before the demurrer, plea or answer is put in. And in certain other cases he may amend, of course, afterwards, but usually application must be made to court by motion for leave to amend. The amendment must have reference to matters existing before the commencement of the suit; a matter which has occurred since the commencement of the suit must be brought before the court by a supplemental bill. When amendments are made by leave of the court, or, of course, a copy of the bill as amended is filed and a copy



of the amendments referring to the paragraphs and folios amended is filed and a copy of such amendments served. The amendment and original bill are considered, for most purposes, as one, and make up the same record.

#### APPOINTMENT OF A RECEIVER.

Whenever in the progress of a suit a proper showing is made to the court that there is danger of the waste and destruction of property which is the subject of the litigation, a receiver may be appointed, charged with the duty of caring for such property.

#### PAYMENT OF MONEY INTO COURT.

Whenever it appears to the court that there is a balance of money which it is admitted is due to the complainant in the hands of the defendant, he will, by an order of the court, be directed to pay it into the hands of the register. And the court may make a still further direction and order the money so paid into court to be deposited or invested on good security.

#### REFERENCES.

Whenever it is necessary in the progress of a cause to take an account, to investigate the title of persons to property in suit, or make any other inquiries necessary to satisfy the conscience of the court, or to perform some special ministerial act, such as to sell property, etc., the court refers the matter to a circuit court commissioner. References are of such frequent occurrence, and so important, that they form the subject of a subordinate system of practice. (See Hoffman's Master in Chancery.)

There is such a variety of orders that in this short synopsis we can only indicate what the practice is. In case, for instance, the defendant has money in his hands belonging to the complainant, which the complainant desires to have paid into court, he notifies the defendant's solicitor that he will make a motion to that effect. At the time and place mentioned in such notice an oral motion is made and argument had. If the Court grants the motion, an order is entered in accordance therewith or such an order as the court deems proper under the circumstances.

Another most important interlocutory proceeding is that of granting an injunction restraining the defendant from doing some particular act or acts which will do irreparable injury to the complainant. When an injunction is issued during the pendency of the suit, it is called a preliminary injunction; when it is made a part of the final decree it is called a final injunction. When the bill prays for an injunction it will be granted if the court is satisfied that the plaintiff is entitled to that relief.

The injunction should be served on the defendant. Service is made in the same manner as service of a subpoena, by the sheriff, who makes his return upon the original writ.



## REPLICATION TO ANSWER.

As we have already said, if the answer is such that the complainant is satisfied that he can obtain the relief he desires on the admissions made therein, he notices the cause for hearing on the pleadings. If, however, the answer controverts the facts charged in the plaintiff's bill, or sets forth new facts and circumstances, which the plaintiff is not disposed to admit, he files a replication to the defendant's answer. Formerly, if the defendant's answer stated new facts, in opposition to those alleged in the bill, the complainant was accustomed to reply by a special statement of other facts, not before charged. This produced a rejoinder by the defendant. A sur-rejoinder frequently followed the rejoinder, and a rebutter the sur-rejoinder, and so on as long as new facts were set forth by one party and denied by the other.

Michigan Chancery Rule 12 requires the replication to be filed within fifteen days after service of the answer. Otherwise the cause shall stand for hearing upon bill and answer. That rule also provides that the replications may be in substance as follows:

"The complainant says that, notwithstanding the answer of the defendant, he is entitled to the relief prayed for in his bill of complaint."

Upon the complainant filing a replication to the answer the cause is at issue (Mich. Rule 13.)

## TESTIMONY.

The cause being at issue, by the filing of a replication, the parties may proceed to their proofs under the rules of the court for the purpose of establishing their respective contentions.

There have been within the past few years such important and radical changes in this part of chancery practice that we will confine our attention to the practice in this state. Similar changes have been made in other states.

Within ten days after the cause is at issue either party may give notice and have the testimony taken in open court. If neither party so elects, the testimony shall, without further order, be taken before a circuit court commissioner, unless the parties stipulate to take it before some other person authorized to administer oaths. The complainant must put in his testimony within thirty days after the ten days limited by law for giving notice of taking proofs in open court. The defendant then has forty days within which he must put in his testimony. The complainant has forty days within which he must put in his testimony. The complainant has twenty days thereafter in which he may put in rebutting testimony. Each party must give the other four days' notice of the time and place of taking testimony. The time for taking testimony may be extended by the court upon cause shown. (Rule 14.)

The testimony is taken orally. The questions upon direct and cross-examination are asked by the respective solicitors and the questions and answers are written out in full by the commissioner. If any question is objected to, such objection is taken



down by the commissioner. The commissioner, however, does not rule upon the objection, but takes down the answer as though no objection had been made. The testimony of each witness is read over to him and he then signs it.

Within five days after the testimony is concluded, the commissioner, at the request of either party, returns and files the testimony and the exhibits with the register. The testimony is closed when the time for taking it has expired and no order closing proofs need be entered. (Mich. Rule 14.)

In case witnesses reside out of the state or more than thirty miles from the residence of the commissioner, either party wishing to examine them may, during the time the order to take proofs is in force, present a petition to the register, stating the names and residences of the witnesses and of the persons proposed as commissioner, asking for the issuance of a commission to take the testimony of such witnesses. The adverse party, if he wishes, may join in such commission.

Formerly all the testimony taken in chancery proceedings was upon written interrogatories, but at the present time it is only necessary to resort to written interrogatories when the witnesses reside out of the state. The interrogatories, direct and cross, are settled by the commissioner, the practice being for the solicitor, whose witness is to be examined, to serve upon the opposing solicitor a copy of the direct interrogatories and a notice of the time and place of their settlement. And such solicitor may, at such time and place, have cross interrogatories settled.

Proof having been closed and the testimony taken, filed in the court, the cause is ready for hearing upon pleadings and proofs.

Either party may notice the cause for hearing. Such notice must be in writing and served upon the opposing solicitor.

#### HEARING OF THE CAUSE.

Upon the hearing complainant opens the argument. It is usual for the court to request the solicitor for complainant to give a statement of the case made by the bill and a statement of the testimony sustaining the complainant's contention, and then to call upon the solicitor for defendant to make a brief statement of the defence, as shown by the pleadings and proofs. When the court has obtained in this manner a clear conception of the case in all its bearings, the regular argument is made and the cause submitted to the court. At the time the cause is submitted, or on some other day, the court announces its decision. This decision is frequently given orally, the solicitors being present. Sometimes a written memorandum of the decision is made and filed by the court, at the time he announces his decision, and sometimes the register makes a minute of the decision in his minute-book. The party in whose favor the decision is made then prepares a draft of such a decree as he thinks he is entitled to in accordance with the terms of the decision, and serves a copy upon the other solicitor, who has a right to propose amendments to it, if he thinks proper so to do. The draft and amendments, if any, are then submitted to the court, and the solicitors are heard upon the settlement thereof.





When the decree has been settled it is entered by the register upon the journal. It is considered as entered from the time it is settled and filed with the register.

### A DECREE IN EQUITY.

Decrees in general consist of three parts:

1. The date and title.
2. The recitals.
3. The ordering part; to which is sometimes added
4. The declaratory part. When this latter part is made

use of, it generally precedes the ordering part.

The decree commences with the name of the court and the place where it is held, the term at which it is pronounced and the title of the cause. It was the practice at one time to recite at length the pleadings and evidence in the cause, but now the decree merely recites the substance of the pleadings and the facts on which the court founds its judgment. After the recitals come the ordering or mandatory part of the decree, containing the specified directions of the court upon the matters before it, which, it is obvious, must depend upon the nature of the particular case which is its subject. When the suit seeks a declaration of the right of the parties, the ordering part of the decree should be prefaced by such declaration.

### RECTIFYING DECREES.

After the court has formally announced its decision and until the decree has been settled and entered, either party feeling himself aggrieved may move the court for a re-argument of the cause or that certain parts of the decision be modified.

After the decree has been settled and entered and before it is enrolled, either party may petition the court for a re-hearing. The petition must state particularly the objections which are conceived to lie against the decree, that the court may be competent to decide upon the propriety of the application; and if the whole decree is objected to, the case of the petitioner and the decretal part of the order are shortly set forth, and an intimation is given of the decree which the petitioner is advised ought to be entered. If any of the facts stated in the petition do not appear on the records of the court, they must be verified by affidavit. The petition for re-hearing must be accompanied by the certificate of two counsel, setting forth that they have examined the case, and that in their opinion the decree is erroneous for the reasons stated. This precaution is taken as a security that the application is not made for the purpose of delay merely.

### AFTER ENROLLMENT.

The general rule is that a decree regularly obtained and enrolled cannot be altered except by a Bill of Review.



## APPEALS.

There is usually a court to which the party who deems himself aggrieved by the decree of the court in which the suit is commenced, may appeal, and if both parties desire, both may appeal. In this state an appeal is taken from the Circuit Court in Chancery to the Supreme Court. This is a purely statutory right, and the provisions of the statute must be strictly complied with.

Notice of claim of appeal is to be filed with the register, together with the bond provided for in the statute, and notice that an appeal has been taken served upon the opposite solicitor. When the appeal has been perfected, the register transmits the records to the Supreme Court.

In the Supreme Court no further proofs are taken and the cause is heard upon the same pleadings and proofs as were before the Circuit Court, when it made the final order, or decree, from which the appeal was taken.

The practice in the Supreme Court and the enforcement of a decree we shall omit and close our suit in equity at this stage in the proceedings.

\*\*\*\*\*



## C H A P T E R II.

-----

## THE PURPOSE AND OBJECT OF PLEADING.

## STATING CAUSE OF ACTION.

Courts are defined to be places where justice is administered. They are instituted for the purpose of securing to every one the right to enjoy life, liberty and the pursuit of happiness. When a person feels himself aggrieved, and he cannot otherwise have redress, he applies to some judicial tribunal to restore to him the right that has been withheld, or to give him reparation for the injury he has sustained. The courts in order that they may administer justice have laid down certain rules which the suitor must conform to when he applies for relief. They will not interfere upon the bare suggestion of an injury. It must appear from the complaint that the suitor is entitled to relief and he must, afterwards, support the matters set up in the application by competent proof.

The disputations of the parties were at first, in the law courts, delivered orally and taken down by the clerk. If the question in dispute turned upon the law governing the case, the party making the objection appealed to the court and the question was decided by the court. If the dispute was over a question of fact, affirmed on one side and denied on the other, an appeal was made to the country, to a jury, and a trial was had before a jury who determined by their finding the truth of the matter in controversy. These preliminary disputations of the parties were called pleadings and the point in dispute the issue. After a time pleadings in the law courts were made in writing, and they were in writing in the chancery courts from the first.

The only object of pleadings is to present the real question in dispute between the litigants freed from all irrelevant and immaterial matter, so that the attention of the court or jury may be confined wholly to the simple question presented. All the rules of pleading, however abstruse and complicated they may appear, have this one object in view. And all those rules when properly understood are seen to be conducive to that end and are perfectly intelligible when referred to the principle above stated.

Let us now apply these principles to the several pleadings as they occur on the part of the plaintiff and defendant, taking up each separately: First, we have the plaintiff's statement of the injury and his application for redress. Here are two points to be considered; first, the nature of the wrong sustained and how it is to be set out and, second, the plaintiff's right to apply to the particular court and the form of the application.



First, the statement of the injury. "Wrongs," says Blackstone (3 Com. 2.), "convey to us an idea merely negative, as being nothing else but a privation of a right." The plaintiff must, therefore, in his application for redress, set out the right of which he has been deprived. This leads to the consideration of rights, which depend wholly upon legal or equitable relations, established by contract, or, the law. Purely moral obligations are not enforced in the courts. All equitable rights rest for their foundation upon some legal duty or obligation. The plaintiff must, therefore, in his statement, set forth clearly the relation in which he stands to the defendant from which the right flows of which he claims he has been deprived. Now, relations let in three separate considerations: first, the parties with their several disabilities and liabilities in law; second, the subject matter, or contract, with the circumstances under which it was made; and third, the legal and equitable rights incident to that relationship. It is because of the infinite variety of relationship that parties stand to each other that courts have found it necessary to make so many and such precise rules for presenting the simple question in controversy to the end that such question may be made plain and intelligible and that the matter may be brought to judgment with convenient certainty.

The statement, therefore, consists of three points:

1. It must set forth the relation between the parties.
2. The right accruing to the plaintiff from that relation.
3. That such right has been withheld.

The first and principal point, therefore, with the plaintiff is to show this right and, however complicated and diffuse, a declaration at law, or a bill in equity may be, if it is a good pleading, it is reducible to three propositions: The first proposition states a rule of law, that a certain right flows from a certain relation; the second, that the parties stand in that relation; and third, that the plaintiff has been wrongfully deprived of the right coming to him from such relation.

The first proposition, the rule of law, is proved:

1. By the statute law, the question in such a case turning frequently upon the construction of the statute.
2. By precedent, former decisions of the court, the question turning upon the rule to be gathered from such precedents.
3. By analogy, when the rule is to be collected from decisions in analagous cases, or, determined from a consideration of the fundamental principles of equity itself.

The second proposition is founded on the facts of the case. The facts stated must be sufficient to establish the relationship claimed in law, and their truth must be established. Their truth is a question of fact, their sufficiency is a question of law. The adequacy of the facts to establish the relation is proved by showing that under the law and precedent they are sufficient to establish the relation claimed.

The third proposition is a question of fact.

Next, as to the application for redress. Every one who has suffered a wrong is prima facie entitled to redress; it is a maxim that the law does not suffer a wrong without a remedy. But a court





is not an inn, bound to supply every applicant with refreshments. The law for the convenience of suitors and the prompt dispatch of business has established a variety of courts and to some of these courts it has given exclusive jurisdiction to hear and determine a certain class of cases. The plaintiff, therefore, must make his application to that court having cognizance of the wrong complained of. Again, the plaintiff must have a right to bring suit and the party sued must not be exempt from such suit. The plaintiff's application must follow the forms which the courts have established as being best calculated to attain the ends of justice that the defendant may know what and how to answer. It must be so framed that the whole question involved and all the parties in interest may be brought before the court so that complete justice may be done and no one harassed unreasonably. And lastly, the application must not be made if a similar application is pending between the same parties in another court of competent jurisdiction.

\*\*\*\*\*



## CHAPTER III.

## PURPOSE OF PLEADING. (Continued)

## STATING DEFENSE.

Having now considered what it is necessary for the plaintiff to do and what his statement of his cause of action must contain, and also what are the requisites of his application for redress, we now turn to the defendant's defence.

The defendant's defence will fall under one of the following positions:

1. A denial of the legality of the complainant's demand, admitting the truth of all his allegations.
2. Denying the truth of the complainant's averments or, some of them, which are essential to his right to recover.
3. Stating new matter on his own behalf which will avoid the complainant's right to recover by showing that either he never had such a claim, or if he had that it has been removed.

The second defences are in bar and go to the merits of the controversy.

4. Denial of the jurisdiction of the court.
5. Denial of the plaintiff's capacity to bring the action.
6. Pointing out some defect in the proceedings.

These later defences are in abatement.

Objections to the application for redress must be made, first, that is, the defendant must exhaust his pleas in abatement before he pleads in bar. If he pleads to the merits he will not be permitted afterwards to plead in abatement. By pleading in bar he waives all objections which it is within his power to waive.

1. If the complainant has commenced his suit in a court which has not authority to hear it, the defendant may object for that reason, which is called a plea to the jurisdiction.

2. The defendant may allege in abatement of the suit: (a) some legal disability on the part of the plaintiff, or, (b) some exemption on the part of the defendant, which shields him from prosecution. These are called pleas to the person.

3. If there is any defect in the mode or form of proceeding in consequence of which the merits cannot be fully passed upon by the court, as when there is a misnomer, or want of parties, or want of certainty in the statement of the cause of action, such defect may be taken advantage of by plea in abatement. The rules require, however, in this class of objections that, if the facts by which the error complained of may be cured, are within the knowledge of the defendant, he must state them, give the plaintiff a better writ: Thus, if there is a misnomer, he must set forth the correct name, or, if there is a want of parties, he must point out who has been omitted.



Next, as to the defence upon the merits, the answer, or pleas in bar. Since every cause of action is due to the deprivation of some duty, or right flowing from some legal relation, every defence to an action upon the merits must be, either:

1. Confessing the relation to deny the right. This is a general issue at law, called a demurrer.
2. Confessing that the right demanded would follow from the relation assumed, to deny, generally, the existence of the relation, which is the general issue in fact, or, to deny some particular allegation upon which the whole relation exists.
3. Confessing the right and relation to deny the subtraction, that is, denying that the plaintiff has been deprived of any right, has suffered any wrong, or,
4. Confessing the subtraction to give some valid reason to excuse the non-performance of the duty. The two latter are called special pleas in bar.

Again: the reason assigned in excuse may be two-fold, in reference to the two propositions concerning the relation and the right. First, it may be some new matter to invalidate the prima facie relation set out in the complaint; or secondly, it may be some new matter by means of which, supposing the relation to exist, yet the right deprived from it is gone; and here it is obvious that the reason alleged must be of new matter; for if the same statement appeared on the face of the complaint, the defendant might at once deny the right; which, as observed above, would be a demurrer, or general issue in law. Relations may be considered with respect to the parties, the subject matter, and the incidents.

1. First, then, to invalidate the relation, the new matter may show, first, that the parties were incapacitated from contracting the relation, or are incapable to continue it. Secondly, that the subject matter was insufficient or illegal, or had undergone some alteration. Thirdly, that the right, being incidental, had not accrued.

2. Second, the new matter may show that the right, thought once existing, is barred by the act of party; by the act of law; or, lastly, by the act of God, or unavoidable calamity.

It is clear that to constitute a sufficient answer to any material allegation in a pleading, the adverse party must either deny the allegation altogether, or confess the fact, and avoid the interference, viz.: by setting up some new matter consistent with such allegation, but which, if true, is an answer to it. If, however, he set forth matter inconsistent with the allegation, by way of avoidance, this will not be sufficient, without a direct denial of the allegation. And this for two reasons; first, because as the inconsistent matter is in effect a different statement, both statements may relate to distinct subjects and so be both true; and, second, such denial avoids prolixity, by tendering an issue at once, and gives the party an opportunity to prove his allegations.

The immediate use and design of pleading is the formation of an issue, which Lord Coke defines to be "a single, certain, and material point, issuing out of the allegations or pleas of the



plaintiff and defendant, consisting regularly upon an affirmative and negative." As soon as this object is effected, therefore, in such manner as to answer the whole of the precedent pleading, the matter is brought to a close; and the party who first arrives at that point is said to tender an issue; and concludes by praying the judgment of the court, if it be a question of law; or if it be a matter of fact, he concludes to the country, i. e., he demands a trial by jury; for if it be a disputed record, he appeals to the record itself, and the adverse party joins issue by doing the like. On the other hand, when a pleading introduces new matter by way of avoidance or excuse, it only concludes with a verification, because such new matter may be contested as to its validity in law or its truth in fact, or the other side may adduce new reasons to invalidate it in turn. In this latter case, the pleadings must advance one step further.

Having taken this view, we shall now proceed to the plaintiff's reply to the defendant's plea, called the replication. The replication being an answer to the plea, we shall consider it with reference to the four modes of defence already enumerated. It is manifest that the first two constitute issues, there being an affirmation on one side, met by a denial on the other. The replication in these cases, therefore, only joins issue.

The third mode of defence, namely, the denial of subtraction is always put affirmatively, by averring a performance; because this is a proposition which admits of dispute both in law and in fact, and, therefore, the opposite side should have an opportunity of answering it, which is done by assigning a particular breach. This last mentioned replication bears a strong analogy to that which is called a "novel assignment," viz.: where the complaint not having been set out with sufficient precision, it becomes necessary from the evasiveness of the plea, to re-sign the cause of action with fresh particulars.

It is, however, the excusing non-performance (being the fourth mode of defence) which opens the widest range for replication. The statement of excuse may, like the statement of the right, be reduced to two propositions, and of a similar nature. The first proposition is--

That certain incidents superadded to the admitted relation, operate as a legal discharge to the otherwise resulting liability.

The second--That such incidents affect the acknowledged relation.

Therefore, That the defendant is discharged from liability.

The first proposition here is a question of law, and may be met by demurrer; the second is a question of fact, and may be denied or confessed, and avoided by a new showing; or traversed, in a manner precisely similar to that which we have described at large, when treating of pleas in bar.

To the replication the defendant must again rejoin, by taking issue or tendering issue, or adding new matter of avoidance; and so on, until the parties arrive at the true and simple point of controversy.

\*\*\*\*\*





## C H A P T E R IV.

-----

## EQUITY PLEADING AND PRACTICE.

Chancery Pleadings are the written allegations of the respective parties; on the part of the complainant the bill of complaint and the replication to the defendant's defence, when necessary; and on the part of the defendant, the demurrer, plea or answer.

The practice of the court of equity, are the various steps taken by ~~the~~ several parties under the rules adopted by the court, in the suit from its commencement to its final determination. In theory and upon principle, pleadings and practice are entirely separate and distinct, and that fact should be constantly kept in mind, but since, in the conduct of a suit, there is necessarily a step taken in pleading followed by one in practice, it will be more convenient and satisfactory to consider pleadings and practice together, as questions touching the one or the other naturally arise in the conduct of a suit.

The following is an old definition of a bill in equity (Cursus Cancellaræ 36): "A bill in equity is in the nature of a declaration at common law, wherein the complainant is to set forth the circumstances of his case for some fraud, force, or injury done him, praying relief of the court, for that he has no remedy by the common law; and also process of subpoena against the defendant to compel him to answer the charge of the bill." We have already called attention to the fact that in setting forth the wrong that has been done him the plaintiff does no more than to show that he has been deprived of a certain right, which belongs to him by virtue of certain relations that exist: that rights are incident to relations and that to prove the right you must show that the relation to which the right is incident exists. Relations again must be considered with reference:

1. To the parties with their several liabilities and disabilities;
2. The subject matter of the contract, the circumstances under which it was executed and the nature of the property in litigation; and lastly,

The legal and equitable incidents, rights, the withholding of which is the cause of complaint.

In speaking of relations Lube says: "Relations may be divided into primary or original--secondary or derivative--and collateral. The first are those which subsist between the original parties; the second are such as are derived therefrom, either by the transmission of interest, or the transfer of title or liability. Thus there is a primary relation between the mortgagor and mortgagee; but if the mortgagor assigns his equity of redemption, there then arises a new or secondary relation between the mortgagee and the



assignee of the equity. A collateral relation is that which exists between two or more derivative parties."

"The original relation may arise, either, 1st, out of a specific contract, the incidents of which must depend upon the terms of agreement, as in those cases where a specific performance is sought to be enforced; or, 2d, the relation may be such as though arising from contract between the parties, is nevertheless recognized and ascertained by the law, which attaches to it certain essential incidents and ingredients--such as the relation of partnership, or mortgagor and mortgagee, and the like; or, 3d, it may be produced by the act of a third person, as in the relation of executor and legatee; or, 4th, it may arise by the operation of law, as, for example, the relation between tenant in dower and heir at law."

"In the first instance, as the nature of the relation is to be collected from the words of the contract, if the agreement be in writing, it must in general be set out verbatim in the bill; if not in writing, then such collateral circumstances must be stated as raise a strong presumption in favor of its existence. On this point of the specific performance of parol agreements, various rules have been laid down in equity, with which the student should make himself acquainted, in order to frame his bill in cases of this nature. In the statement of specific contracts, the agreement must also be shown to be of such a kind as not to militate with general policy, and that the stipulations contained in it are such as a court of equity ought in conscience to enforce. The circumstances under which the agreement was made, form therefore, in most instances, a material part of the statement; and every fact should be set out, by way of inducement, tending to show that the consideration was valid and the terms fair and equitable; for it is a maxim, 'that he that would have equity should do equity.'"

In the second case above noticed, where the relation is one recognized by law, all the legal requisites to form such relation and the liabilities resulting from it, should be well understood, that the draftsman may be able to bring the case in the bill within the meaning of the law, and show such a breach as constitutes an injury cognizable in equity. As this kind of relation is founded in like manner as the former, on the contract of the parties, it will be subject to the same rules with regard to the equity of consideration and origin.

The same observations will apply to the 3d and 4th classes above enumerated, with this additional remark--that all the circumstances that led to the existing relation, must be succinctly alleged by way of preamble, both for the advantage of clearness of statement, and also in order to deduce the complainant's title.

This last is essential to every bill, and in general, it is to be remarked, there are four things indispensably requisite to be shown in the stating part, namely:

1. The complainant's interest in the thing demanded.  
Michaux v. Grove, 2 Alk, 210.
2. The complainant's right to bring suit.  
Sackville v. Ayleworth, 1 Vern. 105.



## 3. The defendant's interest.

Stewart v. East India Co., 2 Vern, 330.

## 4. The defendant's liability, since there must be both liability and interest, and there may be one without the other.

Crossing v. Honor, 1 Vern, 180.

Thus, an executor, before he has proved the will, has an interest in the testator's chattels, but not such as to give him a title to sue; so also an assignee has an interest in the thing assigned, although not liable to be sued for breach of covenant, unless such covenant runs with the land.

1 P. Wm. 172, 176.

In deducing the title in the third class of original relations, it will be seen that such a preamble is necessary as will show that the person creating the relation had the power to do so, whether by law or by express power in a deed. In the first case the capacity is all that need be stated--as, for example, "that the testator was, at the time of making his will, and at his death, seized of or entitled to freehold estate, and possessed of personal property; and being of sound and disposing mind, made and published his will, with the usual formalities." With regard to the execution of a power created by deed, it will in general be requisite to set out the power in hoc verba, since a question may turn on its extent or validity; and if the latter be likely to be contested, the preamble should go back to the original of the instrument containing the power.

With respect to relations arising by operation of law, we need only observe that the progress of the operation should be traced from the prior relation to its subsequent effect, and the circumstances must be shown to be such as that the legal results necessarily ensue.

The relation having been clearly set forth, then follows the statement of the wrong which the plaintiff has suffered, which is no more nor less than the neglect or refusal of the defendant to perform his legal duty to the plaintiff, or when the situation of the parties is such, from fraud, accident or any other cause that manifest wrong or irreparable injury will result unless the court of equity interposes.

\*\*\*\*\*



## C H A P T E R V.

-----

## WHO MAY SUE IN EQUITY.

All bodies politic and corporate and all persons of full age and of sound mind, not laboring under some special disability may exhibit their bill in equity.

Story Eq. Pl. § 50.

The government, state or national, may bring suit to enforce its rights and interests. When the right to be enforced is public but belongs to some individual the suit is usually brought, although not necessarily, by the Attorney General, at the relation of such private person, who is regarded as the real plaintiff and he is responsible for costs.

Strickland v. Weldon, L. R. 28 Ch. Div., 426.

Burbank v. Burbank, 152 Mass., 254.

U. S. v. San Jacinto & Co., 125 U. S., 273.

An alien sovereign or government, foreign corporations, either private or municipal, may sue in equity.

King of Prussia v. Krupper, 22 Mo., 550.

" " " v. " Cas. Eq. Pl. & Pr. 3.

Silver Lake Bk. v. North, 4 Johns Ch., 370.

B'k. of Scotland v. Ker, 8 Sim., 46.

The incapacity which may disqualify a person from bringing suit may either be absolute or partial. It is absolute when it wholly disables the party from suing; it is partial, when it disables him from bringing suit without the aid of a second person. At common law the absolute disabilities were outlawry, excommunication, attainder and alienage combined with the character of enemy.

Bell v. Chapman, 10 Johns., 183.

" v. " Cas. Eq. Pl. & Pr., 1.

Married women at common law, infants, idiots, lunatics and other persons under guardianship, such as spendthrifts and drunkards are partially incapacitated.

In most of the states the common law disability of married women has been removed by statute and a married woman is empowered to hold property, contract with reference to the same and sue and be sued as though she were a femme sole.

The infant must bring suit by his next friend, who is supposed to be his nearest relative and one who has no personal interest in the suit. The next friend is liable for costs and the court will in every case protect the estate of the infant when the suit has been instituted improperly.

Jarvis v. Crozier, 98 Fed. Rep., 753.

" v. " Cas. Eq. Pl. & Pr., 7.

Waring v. Crone, 2 Paige, 79.

" v. " Cas. Eq. Pl. & Pr., 11.





If a suit is commenced by an infant, the defendant may refuse to answer. But the proceedings are not void, but voidable and the court will appoint a next friend for the infant upon request.

Bartlett v. Battz, 14 Ga., 539.

" v. " Cas. Eq. Pl. & Pr., 18.

When a suit is commenced against an infant, process is served upon the infant but no further steps can be taken until a guardian ad litem has been appointed by the court. In making such appointments the Court will consult the interests of its ward, the infant, and usually will not appoint a person named by the plaintiff. It is the duty of the guardian to be diligent in his defence of the infant's rights and he will be liable to the infant for any damages due to his negligence in that regard.

Knickerbocker v. DeForest, 2 Paige, 304.

" v. " Cas. Eq. Pl. & Pr., 15.

Enos v. Capps, 12 Ill., 255.

" v. " Cas. Eq. Pl. & Pr., 17.

Johnson v. Waterhouse, 152 Mass., 585.

" v. " Cas. Eq. Pl. & Pr., 20.

McDermott v. Thompson, 29 Fla., 299.

" v. " Cas. Eq. Pl. & Pr., 23.

At common law the crown had charge of idiots and lunatics, and committees were appointed to take care of those who had been found to belong to either class. In some of the states committees are still appointed in this class of cases, but generally in this country a guardian is appointed by the proper court to care for these classes of unfortunates. The idiot or lunatic is represented in court by his committee or guardian as the case may be.

As a general rule a suit cannot be commenced by an idiot or lunatic by his next friend, but by his committee. If, however, it is necessary to institute such a suit to preserve the estate of the incompetent, the Court will assume jurisdiction for that purpose and until a committee can be appointed.

Dorsheimer v. Roorbank, 18 N. J. Eq., 438.

" v. " Cas. Eq. Pl. & Pr., 25.

Roughan v. Morris, 37 Ill. App., 642.

" v. " Cas. Eq. Pl. & Pr., 26.

As a general rule, any person who may sue can be made a defendant. To this rule, however, there is this important exception, the state may not be made a defendant without its consent.

Story Eq. Pl. §§ 67, 68, 69.

The Davis, 10 Wall, 153.

Car v. U. S., 98 U. S., 433.



## C H A P T E R VI.

-----

## PARTIES TO THE SUIT.

It is necessary, first of all, for the pleader to determine what persons he will make parties to the suit.

It is a rule of law, recognized by all courts, that no one's rights, either of person or property, shall be adjudicated unless he is present in court. Every one is entitled to be heard, to have his day in court. It follows, therefore, from this rule that every person against whom the pleader desires to obtain a personal decree, that is, a decree requiring him to do or refrain from doing some particular act, must be made a party. And if such a person is omitted the omission is a fatal defect.

Chadbourn v. Coe, 10 U. S. App., 73.

" v. " Cas. Eq. Pl. & Pr., 32.

Another rule, not as mandatory as the first requires that all persons who have an interest in the controversy shall be made parties in order that one suit may end the litigation and put at rest as far as possible the controversy in all its ramifications. Combining these two rules we have the general rule as to the proper parties to a suit in equity. "All persons having an interest in the subject and object of the suit, and all persons against whom relief must be obtained in order to accomplish the object of the suit, must be made parties."

Stevenson v. Austin, 3 Met., 474, 480.

Williams v. Bankhead, 19 Wal., 563.

Brown v. Circuit Judge, 75 Mich., 274.

The parties to a suit in equity are styled plaintiffs and defendants as at law, although it is usual to designate the plaintiff as complainant, but while at law the interests of all the plaintiffs is adverse to that of all the defendants, in equity the interest of the party does not determine the question as to whether he is plaintiff or defendant. It frequently happens that some of the defendants to a suit have interests which are identical with those of some of the plaintiffs. It is desirable that all the persons having interests that will be affected in the same manner should be arranged on the same side, but it is far from necessary, and if any person whose natural position is among the plaintiffs refuses to so appear he can be made a defendant, and the fact that he is a defendant will not affect his rights. The court in ascertaining and determining the rights and interests of the several parties to the controversy does so without considering at all the fact as to whether they are plaintiffs or defendants.

Center v. Dawson, 2 Bland 264.

Fawkes v. Pratt, 1 Pere Wm., 593.

Bedford v. Leigh, 1 Dickens, 707.



"All persons having an interest in the subject matter of the suit" refers to those having an interest which will be, or may be, affected by the decree rendered.

Parties to a suit in equity are classified as formal, proper or necessary and indispensable.

A formal party is one who has no interest in the controversy between the plaintiffs and defendants, but who has an interest in the subject matter which can be adjusted in the suit.

A proper or necessary party is one who has such an interest in the suit that he should be made a party to enable the court to adjust all the rights involved.

An indispensable party is one whose interests are such that a decree cannot be made without affecting them.

Chadbourn v. ———, 10 U. S. App., 78.

" v. ———" Cas. Eq. Pl. & Pr., 32.

The distinction between an interest in the suit and an interest in the subject matter of the suit must be borne in mind.

One may have an interest in the subject matter of the suit and have no interest in the suit; but having an interest in the suit presupposes an interest in the subject matter.

You must, in determining who ought to be made parties to a particular suit, ascertain first, who are interested in the subject matter, and secondly, which of those so interested have interests that will be affected by the decree of the Court. The latter are necessary parties and ought to be made parties, and if these interests will necessarily be affected, they are indispensable parties. The former, if their interests cannot be affected by the decree should not be made parties and if they are made parties there will be a misjoinder. For instance, if a bill is filed to foreclose a second mortgage and the first mortgage is due, the first mortgage may be made a party at the option of the complainant; if the mortgage is not due he may not be made a party.

Chadborne v. Coe, Cas. Eq. Pl. & Pr., 32.

When the pleader is in doubt as to whether or not a particular person should be made a party, it is advisable to omit him, since if it should be found afterwards that he is a necessary party he may be added. And if such a person is made a party in the first instance, make him a party defendant rather than complainant. When parties are improperly joined as complainants, the misjoinder is often fatal, but when there has been a misjoinder of defendants, the suit will usually be dismissed as to those who are not proper parties and proceed as to the others.

Daniel Ch. Pr., Chap. 5.

Fulham v. McCarthy, 1 H. L. Cas., 703.

When it appears that one or more who of right ought to be made parties, are out of the jurisdiction of the court, or that making them parties would oust the court of jurisdiction, the court may proceed without their presence, provided the interests of those made parties are such that the controversy can be satisfactorily determined as to them, without prejudicing the rights of those not made parties.

Mulligan v. Melledege, 3 Cranch, 220.

Bank v. Campbell, 14 Wall., 87.

Story v. Livingstone, 13 Pet., 359.



And when the parties on either side are very numerous, and cannot, without inconvenience and delay, be all brought in, the suit may proceed if all the adverse interests are sufficiently represented by the parties before the court.

Mandeville v. Riggs, 2 Pet., 482.

Williams v. Bankhead, 19 Wall., 563.

When proper parties are not made parties to the bill, the reason for not making them parties should be set forth, because if their interests are such that in the opinion of the Court they are indispensable parties the bill will be dismissed unless they are added and service had upon them.

Riddle v. Mandeville, 5 Cranch, 322.

Cassidy v. Skimin, 122 Mass., 406.

The parties defended must be designated in the bill and process prayed for against them.

Hoyle v. Moore, 4 Ind. Eq., 175.

" v. " Cas. Eq. Pl. & Pr., 50.

Where the subject matter of the controversy belongs to a voluntary society, unincorporated, the complainants must exhibit their bill as individuals and not as a corporation.

Lloyd v. Loaring, 6 Ves., 773.

" v. " Cas. Eq. Pl. & Pr., 44.

For the purpose of illustrating the rule as to parties, formal, necessary and indispensable, let us suppose that on July 1, 1900 A. is the owner of certain bonds upon which he gives B. a mortgage to secure his promissory note for \$1,000 payable in three years. On Dec. 1, 1900, A. gives C. a mortgage to secure his two notes of \$1,000 each payable in two years. On January 1, 1901, A. gives D. a mortgage to secure his note for \$500, payable in five years. On June 1, 1902, A. sells the land subject to the said mortgages to E.

Nov. 1, 1902, C. sells and assigns one of the two notes secured by mortgage to F. The second mortgage not having been paid on August 1, 1903, C. files his bill to foreclose that mortgage, F. having refused to join him as complainant.

Formal Parties: B. may or may not be made a party at the option of C. B's Mortgage is due and can be paid out of the proceeds of the sale. But since he has a first lien his interest will not be affected by the foreclosure of C's mortgage.

Proper or necessary parties:--If D. is made a party his equity under the third mortgage will be barred by the foreclosure. If he is not made a party his interest will not be affected. Consequently, if within the jurisdiction of the court he must be made a party otherwise he may be omitted.

Indispensable parties:--A. F. E. A. is an indispensable party since he is entitled to be heard before a decree will be given for the amount due, and also if the complainant desires to hold him liable for any deficiency. E. is an indispensable party since he owns the land that is to be taken in satisfaction of A's debt. F. is an indispensable party since he is a part owner of the mortgage debt, the whole of which must be paid out of the proceeds of the sale of the mortgaged property.





In a partition suit, all persons having an interest in the premises, whether in possession or otherwise, even the holder of a dower interest, which has not been admeasured, must be made a party.

Striker v. Mott, 2 Paige Ch., 387.

When a person is made a party to a suit in equity (either as plaintiff or defendant) who ought not to have been, there is said to be a misjoinder of parties. Such misjoinder is fatal unless the bill can be amended and the misjoined plaintiff dropped or the bill dismissed as to the misjoined defendant.

-----



## CHAPTER VII.

## MULTIFARIOUSNESS.

What has been said as to formal, proper, or necessary and indispensable parties refers to the persons interested in a single cause of action. Separate and independent causes of action can not be united in a single suit in equity and this rule limits and modifies that other rule that the whole of a given controversy must be determined in one suit. If two or more separate and independent causes of action are united in the same bill, it is said to be Multifarious, although all the parties are interested.

Dan. Chy. Pr., 382 Note.

Brunner v. Bay City, 46 Mich., 236.

" " " Cas. Eq. Pl. & Pr., 37.

Judge Campbell gives the following rule as to multifariousness: "The general rule of equity is that every several grievance must be redressed by a several proceeding. The only recognized exception to it (and they are considerably qualified) are instances where there is a single right asserted on one side which affects all the parties on the other side in the same way, or a single wrong which falls on them all simultaneously and together. The instances which are most familiar are rights in common which are resisted by the owner of the estate which is charged, tax rolls assessing all parties on an equal ratio, frauds by trustees affecting all the cestius que trustent, and the like. . . . If there is any distinction in the proportion or character of the several grievances, there can be no joinder."

"When the cause of grievance does not arise out of the same wrong, affecting all at once as well as similarly, there is no foundation for such joinder."

Kerr v. Lansing, 17 Mich., 34

One of the instances mentioned by Judge Campbell is that of several taxpayers who may unite when a particular tax has been assessed against all of them upon the same roll upon the same bases. But in this class of cases they must not only have a common grievance, but that common grievance must be the result of the same facts and circumstances. They must not only all object to the same tax, but they must have one common objection. For instance, if it is a tax levied for the cost of some public improvement, a paving tax, ditch tax, or the like, the irregularity complained of must affect them all alike. One cannot complain of one irregularity which makes the tax void as to him, and another of some other irregularity which makes the tax void as to him. If each has a separate grievance, although it goes to the whole tax or to some part of the tax, each must bring a separate suit.

Winslow v. Jenness, 34 Mich., 84, 87.

" v. " Cas. Eq. Pl. & Pr., 60.



Vice-Chancellor Wilkins thus defines multifariousness:--"There are three analagous vices to which bills in equity are subject--misjoinder of plaintiffs, misjoinder of defendants, and multifariousness, or misjoinder of subjects of suit. Multifariousness, properly so called, exists when one of the defendants is not interested in the whole of the relief sought, as the old form of the demurrer for multifariousness shows. Misjoinder of subjects of suit is where two subjects distinct in their nature are united in one bill, and for convenience sake the court requires them to be put in two separate records."

Pointon v. Pointon, L. R. 12 Eq. 547, 555.

" " Cas. Eq. Pl. & Pr. 65.

Murray v. Hay, 1 Barb. Ch., 59.

" v. " Cas. Eq. Pl. & Pr., 39.

A bill is not multifarious, however, because it unites several parties as defendants, each of whom is not interested in the whole of the subject matter of the suit. As when a bill is filed against several persons, for instance, for an accounting for a stock of goods which one of the defendants has fraudulently disposed of to the others, who had knowledge and were parties to the fraud.

Ingersoll v. Keroy, Walk. Ch., 65.

Blake v. Van Tilbury, 21 Wis., 679.

Fellows v. Fellows, 4 Cow., 682.

A bill filed for a partition of land between tenants in common is not multifarious, because it asks for an accounting as to the property and that a tax title obtained by one of the tenants for a tax levied while the land was owned in common be set aside.

Page v. Webster, 3 Mich., 283.

Williams v. Gray, 3 Greenl. 207.

Woodruff v. Young, 48 Mich., 548.

When several persons each hold a separate and distinct claim to title to a parcel of ground, one of them filing a bill to quiet title cannot unite the others in the same bill as defendants; but if, before the suit is commenced, the others should have each conveyed his title to some one person, then all these several titles, or claims to title, could be litigated in the same suit.

Hunter v. Platt, 11 Mich., 264.

Woods v. Monroe, 17 Mich., 237.

Hammonton v. Lott, 40 Mich., 190-193.

If the plaintiffs have a common interest, and the defendants against whom relief is prayed have a common liability, under a contract, or through a wrongful act, there is no misjoinder, although the rights and liabilities of the parties are different.

Warren v. Warren, 36 Me., 300.

" v. " Cas. Eq. Pl. & Pr., 52.

And when the object of the suit is single and the interest of each defendant relates to any relief obtainable although conflicting as between themselves, there is no misjoinder.

Rogers v. Blackwell, 49 Mich., 192.

Lockwood Co. v. Lawrence, 77 Me., 297.



Several persons who act independently of each other when their independent acts tend to produce a common injury, may be joined as defendants in a bill to restrain each from doing the acts the combined effect of which produces the injury. In such a case the object of the bill being single, the separate and independent interests of the defendants does not make it multifarious.

Crossly v. Lightowler, L. R. 3 Eq. Cas., 279.

Saunders v. Jackson, 98 Ill., 78.

To determine whether a bill is multifarious, you must look to the stating part and not to the prayer. The prayer may ask for separate and distinct relief, only a part of which the plaintiff is entitled to under the case made in his bill.

Hammond v. Bank, Walk. Ch., 214, 247.

If the defendant thinks that a bill is multifarious, and desires to take advantage of that defect, he should demur, for if he answers, and the objection is made for the first time at the hearing, the court will act wholly upon its own judgment as to whether, under the pleadings and proofs, a decree can conveniently be made which will readily settle the adverse interests of all the parties. The proofs may have eliminated the objections altogether. And the court will, after the proofs are taken, dispose of the whole matter upon the merits rather than subject litigants to further expense and delay.

Converse v. Mich. Dairy Co., 45 Fed. Rep., 18.

Fuller v. Baxter, 59 Vt., 467.

-----





## C H A P T E R VIII.

-----  
ADDRESS OF THE BILL.

The address must contain a proper description of the court in which it is filed, and since that differs in the different states the bill must be varied accordingly. A bill which is not properly addressed is defective.

Eow v. Butters, 2 Chicago Legal News, 33.

Sterrick v. Pugsley, Fed. Cas. No. 13379.

" v. " Cas. Eq. Pl. & Pr. 71.

## INTRODUCTION.

The purpose of the introduction is to inform the court at the outset who the complainant is and whether he sues in his own name or in a representative capacity. The residence of the complainant should be given since if a non resident he will be required to give security for costs.

Grove v. Pettis, 4 Sandf. 404.

" " Cas. Eq. Pl. & Pr. 73.

The bill must show on its face that the court has jurisdiction and consequently if on omission to give the residence of complainant leaves the question of jurisdiction in doubt, the omission is a fatal defect.

Harvey v. Richmond etc., 64 Fed. Rep. 19.

" " Cas. Eq. Pl. & Pr. 74.

A corporation is deemed to be a citizen of the state under whose laws it is organized. When a corporation is a party it should be described by its proper name, followed by an averment that it is a corporation created and organized under the laws of the state of \_\_\_\_\_, and has a place of business at \_\_\_\_\_.

Winnepiseogee v. Young, 40 N. H., 420;

Central Mnfg. Co. v. Hartshorn, 3 Conn., 199;

Penn. Co. v. Railroad, 118 U. S., 290;

Goodlett v. Railroad, 122 U. S., 391.

The court will take judicial notice of a domestic public corporation.

Withers v. Warner, 1 Str., 309.

A voluntary association has no right to sue in the name of the association. The action must be brought in the names of the persons composing the association.

Story Eq. Pl. § 386.

1 Daniel Chy. Pr. 29, 30.

When a bill is filed by a person in a representative capacity, the averment must be sufficiently full and explicit to show that



he has a right to maintain the suit.

Middleworth v. Nixon, 2 Mich., 425.

Manning v. Drake, 1 Mich., 34.

When a bill is filed by one of a class for the benefit of the complainant and all the other members of a class, it must be so stated.

Bedford v. Leigh, 2 Dickens, 707.

Sosby v. Wickliffe, 7 B. Mon., 120.

#### STATING PART OF THE BILL. DECREE OF CERTAINTY.

The stating part of the bill contains a statement of the facts upon which the complainant asks the relief prayed for. The whole bill, but especially the stating part, should be drawn with the utmost care. All necessary facts must be set forth, and all such other facts as tend to emphasize and magnify the complainant's equities should be narrated. The language used should be simple, precise and must be certain to a common intent. Speaking of the degree of certainty with which the allegations in the bill must be made, Justice Story says "that there are three kinds of certainty applicable to different parts of the pleadings; the first kind is certainty to a common intent, and that is sufficient as a bar, which is sufficient to defend a party, and to excuse him. The second is, certainty to a certain intent in general, as in courts, replications and other pleadings of the plaintiff; that is, to convict the defendant as in indictments, etc. The third is, certainty to a certain extent in every particular, as in estoppels, which are odious in the law."

Story Eq. Pl. § 240;

Co. Litt. 303 a.

It is somewhat difficult to clearly distinguish these different degrees of certainty from each other and especially to indicate clearly the distinction between the first and second which are often confounded both by text writers and courts. There is a certainty to a common intent, when the usual meaning of the words used convey to the ordinary mind a clear statement of a fact. If there is uncertainty or ambiguity they are not certain to a common intent. As an illustration of what is meant by certainty to a common intent the case of

Dovaston v. Payne, 2 H. Black., 530,

" " Cas. Eq. Pl. & Pr. 118,

is in point. A suit in replevin was brought for certain cattle. There was an avowry on the part of the defendant that the animals were distrained doing damage in his close. The plaintiff to this pleaded that the cattle were in the highway and from there escaped into the close, which was not fenced as by immemorial custom the defendant was required to fence it. To this plea the defendant demurred specially, for that the plaintiff did not state that the animals were rightfully in the highway. The demurrer was held good for the reason that the plea did not state with certainty, to a common intent, that the cattle were rightfully in the highway,



and thus set forth a good defense. The certainty to a common intent must appear from the language of the pleader, and other words cannot be added thereto to make this language certain and unambiguous.

Dovastin v. Payne, 2 H. Black., 530;

" " Cas. Eq. Pl. & Pr. 118.

Fuller v. Hampton, 5 Conn., 416.

Certainty to a certain intent in general is required in indictments charging a crime.

Rex v. Home, Cowp. 672, 682;

Rex v. Linn Regis Doug. 158.

Certainty to a common intent is usually all that is required of the pleader in equity. But this certainty is made up of two distinct elements. (1) Certainty as to the matter, and (2) Certainty as to the manner of charging it.

Hartwell v. Blocker, 6 Ala., 581;

" " Cas. Eq. Pl. & Pr. 122.

As to the matter.--All the facts necessary to constitute a case for the complainant must be stated with the requisite certainty. For instance, if the pleader desires to charge that the defendant has been guilty of a fraud since fraud is not a fact but a conclusion of law, the pleader must set forth with certainty to a common intent all the requisite elements constituting the particular fraud of which he complains. He must allege, with sufficient certainty, the several acts committed by the defendant which taken together show that a fraud has in fact been committed by him.

Or, again, if the pleader desires to compel the defendant to carry out and fulfill a verbal contract with regard to land, since a verbal agreement with reference to land is within the statute of frauds and not enforceable in a court of equity any more than at law, unless it has been partially performed, or some other equitable reason exists, the pleader must with certainty to a common intent show that this particular verbal contract has been taken out of the statute of frauds by part performance or in some other manner.

So much for the matter. As to the manner each of the allegations of fact, or circumstance, which it is necessary for the pleader to allege in order to constitute a fraud or to show that the complainant is entitled to a specific performance of the verbal contract, must be stated with the requisite degree of certainty.

While the matter of the bill need not be set forth with more certainty than to a common intent, it is advisable when it can be done to make the allegations as definite and certain as possible. The pleadings thereby are made more effective and you avoid all questions as to what is charged. And there is authority for the statement that certainty to a common intent is not sufficient in a bill in equity.

Story v. Winsor, 3 Atk., 632.

The bill in this state must be divided into paragraphs, numbered consecutively, and each paragraph must contain, as near as

the following:

1. The

2.

3. The

4.

5.

6.

7.

8.

9.

10.

11. The

12.

13.

14.

15.

16.

17.

18.

19.

20.

21.

22.

23.

24.

25.

26.

27.

28.

29.

30.

31.

32.

33.

34.

35.

36.

37.

38.

39.

40.

41.

42.

43.

44.

may be, a separate and distinct allegation.

Mich. Ch. R. 1.

In drafting the bill the pleader must bear in mind:

1. That it must appear upon the face of the bill that the complainant is entitled to the relief prayed for.
2. That all persons interested in the subject matter of the controversy whose interests must or may be affected by the decree are made parties to the suit.
3. That the suit is properly brought in a court of equity. That the court has jurisdiction.
4. That facts are to be stated, not conclusions of law. And that such facts must be stated directly and positively, and not inferentially.

The order in which such facts shall be set forth is left to the sound judgment and good taste of the pleader. The facts should be so arranged that the narration will not tire, but will interest the court and arrest his attention. Each statement should be set forth with such precision, force and felicity of expression as will insure recollection, and the spirit pervading the whole must, while it is vigorous and aggressive, be so tempered with fairness and justice, that the judgment of the court will be unconsciously convinced of the manifest equity of the plaintiff's cause.

Comstock v. Herrow, 45 Fed. Rep. 660:

" " Cas. Eq. Pl. & Pr. 69.

#### STATE FACTS.

The bill should contain allegations of fact, and not mere recitals of circumstantial evidence from which a fact may be inferred. The allegations must be plainly and distinctly made, so that the defendant may be explicitly informed of the claim made against him, and the theory upon which the complainant intends to rely.

Wilson v. Eggleston, 27 Mich. 257.

Search, 12 C. E. Green 137.

The bill of complainant, however, contains not only a statement of the complainant's cause of action, but is also an examination of the defendant. It is, therefore, permissible for the plaintiff to state the evidence which he expects the defendant will furnish and interrogate him with reference thereto.

Bank v. Levy, 3 Paige 606.

" " Cas. Eq. Pl. & Pr. 102.

When it is necessary to refer to deeds and other documents they should not be set out in full, but the effect and substance of so much of them as are pertinent and material should be given.

Hood v. Inman, 4 Johns. Chy., 437.

" " Cas. Eq. Pl. & Pr. 126.

#### STATE FACTS POSITIVELY.

When the facts are within the knowledge of the complainant, they must be charged positively, but when such facts are not within his knowledge, they may be stated upon the information and

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of subscribers. The names are written in a cursive script, and the addresses are listed below them.

...the ... ..  
... ..  
... ..



belief of complainant, followed by the averment, that he charges them to be true.

Wells v. Bridgewort, 30 Corn. 316.

Campbell v. Railroad Co., 71 Ill., 611.

Stating a fact upon information and belief alone is insufficient, because a traverse of such an allegation puts in issue, not the existence of the fact, but merely the truth of the allegation that the plaintiff has been informed and believes that a certain fact exists. *Informed and believed that he had majority of votes as*

Ex. parte Reid, 50 Ala. 439. *Question of mere belief*

It is sometimes difficult to determine whether a particular fact has been averred directly or inferentially. If from the facts which are directly and positively averred, the existence of some other fact is necessarily and conclusively presumed, such other fact has been sufficiently alleged, but anything short of such conclusive presumption is regarded as mere inference, and will not be considered.

And it has been held that when the statute required the agreement set forth in the bill to be in writing, and there was no direct averment that it had been reduced to writing, but a positive allegation of an agreement, that the court would presume it was a legal agreement. But on the other hand, if it appeared elsewhere in the bill, that the agreement was in parol, the objection could be taken advantage of by demurrer.

Dudley v. Bachelor, 53 Me., 403.

Cozine v. Graham, 2 Paige, 177.

Macy v. Childers, 2 Tenn. Ch. 438, 442.

All the facts necessary to entitle the plaintiff to relief must be stated and with such fullness that if they are admitted by the answer, or by the bill being taken pro confesso, the complainant will be entitled to a decree.

The case made by the bill, if not admitted, must be established by proof and the allegations and proofs must reciprocally meet and conform to each other. Facts established by the admissions of the defendant, or the testimony of witnesses, will not be considered by the court, unless such facts are distinctly alleged in the bill, no matter what weight and importance they may have intrinsically.

The issue presented by the pleadings is the issue to be tried and all evidence which does not bear upon that issue is necessarily irrelevant and immaterial.

Harrison v. Wixon, 9 Peters 483, 503.

Conneston v. Miller, 41 Mich. 608.

Dorn v. Gender, 171 Ill., 362.

" " Cas. Eq. Pl. & Pr., 25.

As an illustration of the necessity which rests upon the complainant of alleging all the facts in his bill necessary to constitute his case, a bill filed to enforce rights conferred by the statute, is a good example. In such a case the bill must show a substantial compliance with every provision of the statute upon which the complainant's right depends.

Remeau v. Mills, 24 Mich., 15.

Bangs v. Stephenson, 63 Mich. 661.

Paine v. Newell, 56 Mich., 245.



And when a complainant claims rights under any judicial proceeding the averments of the bill must show all the facts necessary to establish the validity of such proceedings.

Hobart v. Frisbie, 5 Conn., 592.

Kunkel v. Markell, 26 Md., 390-408.

When a bill is filed to enforce rights given by a statute, and there is an exception in the enacting clause of such statute, the bill must negative such exception; but where there is no exception in the enacting clause, but an exemption in a proviso thereto, or in a subsequent section of the act, the bill need not aver that the defendant does not come within the exemption. The exemption of the defendant if it exists, is a matter of defence.

Attorney General v. Oakland Co. Bk., Wal. Ch. 90.

Teel v. Fonda, 4 Johns, 304.

The bill must contain averments of every fact necessary to give the court jurisdiction. For instance, except in certain cases, the court of equity is not given jurisdiction unless the amount involved is at least a specified sum. In this state the minimum sum is one hundred dollars. When the bill on its face shows that the amount in controversy is not sufficient to give the court jurisdiction, the defect is fatal, and if called to the attention of the court, or discovered by the court, the bill will be dismissed, and when the amount in controversy exceeds that sum, and the bill is silent as to the amount, it is defective.

Gamber v. Holben, 5 Mich., 331.

But although the bill may not contain the specific allegation that the amount in controversy is sufficient to give the court jurisdiction, still if there are averments which clearly and unequivocally show that it must necessarily be of sufficient value, such averments are sufficient to give the court jurisdiction.

Abbott v. Gregory, 39 Mich., 68.

Gidden v. Morrell, 44 Mich., 202.

In setting forth the facts in the bill, the pleader should avoid, as far as possible, all unnecessary recitals of deeds, documents, contracts, or other instruments verbatim. After referring to a document, the pleader may add the following formula: "As by said indenture (or agreement), when proved, will appear," This makes the whole document referred to a part of the record.

Harmer v. Gooding, 3 DeG. & S., 407-410.

Swetland v. Swetland, 3 Mich., 482;

1 Daniel Chy. Pr. 420.

The pleader, however is not permitted to refer to some other bill and make its allegations a part of his own. The rule is that "every original bill must be complete in itself, by allegations embodied in it, or by exhibits attached to it, to enable the court to act upon it without reference to extraneous documents."

Moses v. Brodie, 1 Tenn. Chy., 397.

Mayor v. Singnoret, 50 Cal., 298.

#### FACTS NOT CONCLUSIONS OF LAW.

Facts and not conclusions of law must be stated. For instance, if the bill seeks to have a tax deed set aside on the



ground that the tax for which the land was sold was an illegal and void tax, the facts upon which the pleader relies to show that the tax was in fact illegal and void must be averred, and a mere allegation that the tax is void is not sufficient, however positively made. Such an averment would be a conclusion of law, not a fact.

Gamble v. East Saginaw, 43 Mich., 367.

Foster v. Hill, 55 Mich., 540.

Le Baron v. Shepherd, 21 Mich., 263.

As a general rule an allegation of fraud is insufficient to support proof of facts establishing the fraud. Such facts should have been alleged. On the other hand, if the allegations of fact clearly show that a fraud has been committed there need be no positive allegation of fraud.

The reason for this rule is that fraud being a conclusion of law, not depending upon any particular fact or number of facts. A naked allegation of fraud is a mere statement that the pleader believes that the court will find that the defendant has committed a fraud, without alleging what act or series of acts the defendant has wrongfully done or omitted to do, which constitutes the fraud. Such an allegation does not charge the defendant with doing or not doing any specific act, and no specific act having been alleged there is no foundation to support any proof. But if specific acts are charged and such acts constitute a fraud, to aver fraud is simply to call the attention of the court to a conclusion to which it would come without the assistance of the pleader.

Seals v. Robinson, 75 Ala., 363.

" " Cas. Eq. Pl. & Pr. 76.

Hubbard v. McNaughton, 43 Mich., 221.

Hale v. Chandler, 2 Mich., 531.

Merrill v. Allen, 38 Mich., 487.

When the right of the complainant depends upon the performance of a condition which has not been performed, he must set forth the facts which excuse its performance, an allegation that he has a good excuse is not sufficient to support testimony as to the facts which excused performance. Whether the facts constitute a good excuse is a question of law.

Le Baron v. Shepherd, 21 Mich., 263.

If the bill shows that the injuries complained of are of such long standing that, unexplained, they impute laches to the complainant, the facts relied upon to excuse the delay must be set forth in the bill, or otherwise it may be attacked by demurrer or plea, or the court of its own motion may refuse to consider the case.

Sullivan v. Railroad, 94 U. S., 806.

Hayward v. Bank, 96 U. S., 311.

Spridel v. Henrici, 120 U. S., 377.

Richards v. Mackal, 124 U. S., 183.

#### OFFER TO DO EQUITY.

It is a maxim of equity that he who seeks equity must do equity. Therefore, if under the facts stated, any duty devolves upon the plaintiff which in good conscience he ought to perform, although its performance could not be compelled at law, he must



aver a readiness and willingness on his part to perform it, otherwise he will not be heard to complain.

If the relation of the parties is such that the complainant is required to do something before the defendant is required to move, the bill must show performance on his part, or, in case of non-performance, that he has a good excuse therefor, and he must aver also a willingness to perform from time to time any and all duties that may devolve upon him with reference to the matter in controversy.

Perry v. Carr, 41 N. H., 371.

" " Cas. Eq. Pl. & Pr., 91.

\*\*\*\*\*  
\*\*\*\*\*





## C H A P T E R IX.

\*\*\*\*\*

## THE CONFEDERATING PART.

It is not necessary that the bill should aver that the defendant is confederating with unknown parties with intent to injure and defraud the complainant, unless such is the fact, and that fact is of importance to the complainant. In case, however, that fact exists, and is important, it should be set out as fully and precisely as possible. And in such a case it is better that that fact should appear in the stating part of the bill as constituting a part of the plaintiff's cause of action.

## THE CHARGING PART.

The original purpose of the charging part was to meet and answer some special defence of the defendant. This was done by averring, by way of pretense, each special defence, and then adding matter of reply in the form of a charge. In this way the complainant would avoid the necessity of amending his bill, so as to meet and answer the defence, which the complainants knew in advance the defendant would make.

Smith v. Clark, 4 Paige, 368.

" " Cas. Eq. Pl. & Pr., 92.

Van Riper v. Claxton, 1 Stockton, 302.

Coneston v. Miller, 41 Mich., 608.

## THE JURISDICTIONAL CLAUSE.

This clause is usually retained in this state, although its omission does not render the bill defective. The averment that the court has jurisdiction is a mere conclusion of law at best, and does not strengthen the averments of fact, which show that the cause is cognizable in a court of equity, nor on the other hand will it make good the want of some necessary averment.

Goodwin v. Smith, 89 Me. 506.

" " Cas. Eq. Pl. & Pr. 94.

Bateman v. Wilboe, 6 Sch. & Lef., 201, 204.

Story Eq. Pl. § 34.

In the United State court it is not necessary to insert in the bill the confederating or charging part or the jurisdictional clause.

U. S. Rule 21.

Perry v. Corning, 7 Blatch., 195.

Dunham v. Railroad, 1 Bond., 492.

Walden v. Bodley, 14 Pet., 156.



## INTERROGATING PART.

Formerly this was an essential and important part of the bill. When parties in interest were incompetent to testify, the complainant could in this way alone make the defendant a witness, but now, since the statute permits all parties to be examined as witnesses, the interrogating part of the bill in most cases is of no importance. At common law the answer of the defendant was evidence in the case, and could not be overcome by the plaintiff except by evidence equivalent to the testimony of two witnesses. And consequently when the rules permitted the plaintiff to waive an answer under oath that course was usually adopted. The present Michigan rules (Rule 10.) provide that a sworn answer shall not have the effect of testimony, and therefore the plaintiff can, if he desires, obtain from the defendant a full statement of his defence under oath.

Miles v. Miles, 27 W. H. 440.

" " Cas. Eq. Pl. & Pr., 95.

This part of the bill says that the defendants may answer all the matters contained in the stating part of the bill not only as to their knowledge, but also as to their information, remembrance and belief. If the complainant could trust the defendant to reply fully to all the matters contained, "as though the same were again repeated and he thereunto specifically interrogated," it would not be necessary for this part of the bill to contain any special interrogatories. But it is not always safe to repose so much confidence in an opponent. It is customary, therefore, for the general interrogatory to be followed by specific questions. Such questions must be numbered, and they must ask for discovery touching some allegations made in the bill. The defendant is not required to answer any question having no reference to any allegation made by the bill. Such questions are wholly irrelevant. This part of the bill is simply an examination of the defendant as a witness in the case, and the rules of evidence governing the admission of testimony apply.

Bank v. Levy, 3 Paige 306.

" " Cas. Eq. Pl. and Pr. 102.

Mackelston v. Brown, 6 Ves., 52, 52.

Clayton v. Winchelsea, 3 Y. & Coll., 683.

When an answer under oath is not waived, and the answer is put in under oath, so much of it as is responsive to the interrogating part of the bill is evidence for the defendant in the absence of any rule upon the subject. Putting an answer in on oath, when an answer under oath has been waived, however, does not make it evidence for the defendant.

Newton v. Callaghan, 85 Mich., 301.

Wallwork v. Derby, 40 Ill., 527.

While the strict rules of the common law governing the admissibility of testimony were in force bills were frequently filed to obtain discovery, the defendant's testimony, and the relief to which such discovery would entitle the complainant.



When an answer on oath is waived no relief can be prayed which rests solely upon the necessity of discovery, for the reason that by waiving the right to answer upon oath, the complainant has thereby waived all right to discovery.

Torrent v. Rogers, 39 Mich., 85.

Where discovery, therefore, is desired, an answer upon oath must not be waived and interrogatories should be added, so drawn that the defendant's attention will be particularly called to all those facts and circumstances to which a full discovery is desired. The rules of the Supreme Court of the United States require that these interrogatories shall be numbered and that the complainant shall designate by a note at the end of the bill the particular interrogatories which each of the defendants is to answer.

U. S. Rules 40 to 44 inclusive.

#### PRAYER FOR RELIEF.

Having fully stated to the court his cause of action and explained wherein the complainant has already been deprived of his just rights, or in what manner he is threatened with a deprivation of those rights, the pleader asks, in the prayer for relief, the aid and assistance of the court. The prayer is usually for specific and for general relief. The prayer for specific relief may be in the alternative, that is, the pleader may ask for some particular relief and then add a prayer for some other relief in lieu of the first, in case that should be denied. The pleader is frequently compelled to resort to this course. He may be in doubt in regard to the facts in controversy, or if he is perfectly familiar with the facts he may be in doubt as to the conclusion of law the court will draw from them. In all cases of doubt it is proper to have a prayer for specific relief drawn in the alternative. But a bill so drawn that specific relief in the alternative may be prayed for must be consistent with itself. The bill must not contain distinct causes of complaint which are inconsistent with and defeat each other. The pleader must not blow hot and cold.

Lloyd v. Brewster, 4 Paige, 537.

Cotton v. Ross, 2 Paige, 396.

Hart v. McKeen, Wal. Ch., 417.

Farwell v. Johnson, 34 Mich., 342.

If there is a prayer for special relief merely and upon the pleadings and proofs, the complainant is not entitled to that particular relief, he will not be given any relief at all and his bill will be dismissed, unless he is permitted to amend. The court will not render voluntary aid.

Polk v. Clinton, 12 Ves., 48.

Story Eq. Pl. §§ 40, 41.

English v. Foxall, 2 Peters, 595.

Marder v. Wright, 70 Iowa, 72.

Therefore, in addition to the prayer for special relief, there ought to be added a prayer for general relief, so that if the particular relief asked for is denied, the complainant may be allowed such other relief as is agreeable to the case made by the bill. It has been said that a prayer for general relief is



sufficient, and that a prayer for special relief may be omitted from the bill and asked for at the hearing, except such special relief as an injunction, a writ of ne exeat, etc.

Holden v. Holden, 24 Ill. App. 106.

" " Cas. Eq. Pl. & Pr., 108.

Hiern v. Mill, 13 Ves., 114.

Colton v. Ross, 2 Paige, 396.

Texas v. Heidenberg, 10 Wal., 68.

Pleasants v. Glasscock, 1 Sm. & Mar., 17, 24, 28.

Story Eq. Pl. § 41.

"The general prayer for relief is confined to the claim and the ground of jurisdiction stated in the bill."

Dyer v. Vinton, 10 R. I., 517.

Cloud v. Kiblee, 2 Del. Ch. 23.

Machinist's Matl. Bk. v. Field, 126 Mass., 345.

Dayton v. Dayton, 68 Mich., 437.

Jones v. Van Doron, 130 U. S., 684.

It is very desirable, however, that the pleader should pray for the specific relief to which he believes that he is entitled. It informs the court in advance what relief the plaintiff thinks he is entitled to under the case made on the bill. It is always safe, and clearly prudent, for the pleader to ask for all the specific relief he thinks he is possibly entitled to and then for fear some relief has been omitted to add a prayer for general relief.

Amington v. Siscom, 34 Col., 365.

" " 34 Am. Dec., 72.

When special relief is desired while the suit is pending--for instance, an injunction, writ of ne exeat regno, receiver, etc., the bill should contain a special prayer therefor.

Moore v. Hudson, 6 Mad., 218.

Spooner v. McConnell, 1 McLean, 337.

When a bill is filed for discovery merely and the complainant is not entitled to any relief in addition to the discovery, he must confine his prayer for relief to the particular relief to which he is entitled.

Wells v. Railroad, Wal. Ch. 35.

Loker v. Roll, 3 Ves., 4-7.

The prayer for relief should be divided into paragraphs and each paragraph numbered and such is the requirement of the Michigan rules. Chy. R. I., b.

#### PRAYER FOR PROCESS, SUBPOENA.

At common law the prayer for process was an essential part of the bill, and if it was omitted the bill was demurrable.

Wright v. Wright, 4 Halst. Ch., 143.

" " 3 N. Y. Eq., 143.

Cas. Eq. Pl. & Pr. 111.

In the prayer for process must be inserted the names of all the persons whom the complainant desires to make defendants, and only those whose names are inserted are made defendants.





Howe v. Robbins, 36 N. J. Eq., 19.  
 " " Cas. Eq. Pl. & Pr., 111.  
 Verplank v. Ins. Co., 2 Paige, 488.  
 Lyle v. Bradford, 7 B. Monroe, 113.

If a suit is against a person both in his individual and representative capacity, process must be asked against him in both capacities.

Carter v. Ingraham, 43 Ala., 78.  
 " " Cas. Eq. Pl. & Pr., 113.

There are cases that hold that when the suit is against a person in his representative capacity simply, that when all the allegations are made which are necessary to hold him in his representative capacity and no relief may be had against him in his individual capacity that prayer for process against him personally is good.

Plant v. Plant, 44 N. J. Eq., 18.  
 Ransom v. Geer, 30 N. J. Eq., 249.  
 White v. Davis, 47 N. J. Eq., 187.

The bill must be signed by complainant's solicitor, but need not be signed by complainant.

Martin v. Palmer, 72 Vt., 409.  
 " " Cas. Eq. Pl. & Pr., 117.

#### SWORN BILLS.

Ordinarily the bill need not be sworn to, but there are certain exceptions. Bills must be verified when they are filed:

1. To obtain the benefit of an instrument upon which an action at law will lie.

March v. Davison, 9 Paige, 580.  
 Bennett v. Waller, 23 Ill., 97.

2. To perpetuate the testimony of witnesses.

Laight v. Morgan, 1 Johns. Cas., 429.  
 Story Eq. Pl. §§ 304, 309.

3. To obtain a divorce.

Mich. Ch. Rule 29, a.

4. Bills of interpleader.

Edrington v. Allsbrook, 21 Tex., 186.  
 Monks v. Holroyd, 1 Cow., 691.

5. Bills praying for a preliminary injunction.

Holdrege v. Gwynne, 3 C. C. Green, 26.  
 Moore v. Cheeseman, 23 Mich., 327.

6. Bills praying for a writ of replevin.

Rice v. Hale, 5 Cush., 238.

7. Bills of review.

Sandford v. Haines, 71 Mich., 116.

8. Any bill required by statute to be sworn to.

Mich. Ch. R. 2.

How the bill shall be verified, that is, the form of the oath, is prescribed by the rules governing the particular court where the suit is brought.

Mich. Ch. Rule, 2.

It is usual for the plaintiff to sign the bill if it is verified by him, but such signing is not necessary. If he signs, it



should be, of course, at the bottom and at the right hand.

The bill must be signed by the solicitor for the complainant, as such solicitor. The proper place is at the bottom of the bill and at the left. The signature must be written not printed.

Eveland v. Stephenson, 45 Mich., 394.

The bill should be properly folded and endorsed. The endorsement consists of the name of the court written at the top, followed by the title of the cause, and this much should fill the upper half, then follows the label, "Bill of Complaint" and at the bottom the signatures of the solicitors for complainant as such.

All subsequent papers are to be endorsed in the same manner, except that the label designates the character of the paper and the signature at the bottom is that of the solicitor of the party in whose behalf it is drawn.

When a paper is filed, the register, or clerk of the court, endorses below the label the date of filing.

#### FILING THE BILL.

The bill having been drafted, signed by counsel, verified when necessary, and properly endorsed, is filed, with the clerk in the United States court, with the register of the circuit court in this state. The county clerk in this state is clerk of the circuit court, and register of the circuit court in chancery. But since in popular language he is spoken of as clerk, simply, and the same officer in the United States court is styled clerk, to prevent confusion, we shall refer to him as clerk.

Bank v. Hoyt, 74 Miss., 221.

" " Cas. Eq. Pl. & Pr., 129.

In this state upon filing the bill a subpoena issues as a matter of course under the seal of the court dated and tested of the day of issue and made returnable on a day certain (except Sunday) in term time or vacation, not less than ten days from the issuing thereof.

Mich. Ch. R. 2. c.

When there are several defendants more than one subpoena may issue for convenience in service. The names of all the defendants must be inserted in the subpoena.

Mich. Ch. R. 4. a.

Richardson v. Thompson, 41 Ill., 202.

Formerly the subpoena required the defendant to appear under a certain penalty, mentioned therein, but to remove the danger of mistake among defendants ignorant of the meaning of this command, the rules now provide that the penalty shall be omitted and the defendant shall be notified simply that a bill has been filed and that unless he appears within a given time his default may be entered. This same rule also requires that there shall be underwritten a notice designating the defendants against whom a personal decree is desired.

Mich. Ch. R. 4 c, d.

U. S., Rule 12.



In the United States court when the bill is filed a praecipe must also be filed with the clerk, directing the issuance of a subpoena, and naming the rule day to which it is made returnable, which must be the first or second rule day occurring twenty days after its issuance.

U. S. Rules 7, 11, 12.

#### WHEN IS SUIT COMMENCED.

A suit in equity is commenced when a bill of complaint has been filed, a subpoena issued and placed in the hands of a proper officer for service with a bona fide purpose and intent to have such subpoena served.

United States v. Am. Lumber Co., 85 Fed. Rep. 827.  
 " " " " " Cas. Eq. Pl. & Pr.  
 Crowell v. Botford, 18 N. J. Eq., 458. (134.)  
 " " " Cas. Eq. Pl. & Pr., 141.

#### SERVICE OF THE SUBPOENA.

A subpoena issued out of the United States court is served by the marshal, his deputy, or by some other person specially appointed by the court.

U. S. Rule 15, Re. St. § 922.

It is served by the officer making the service delivering a copy thereof to the defendant personally, or by leaving a copy at his usual place of abode, with some adult person who is a member or resident in the family.

U. S. Rule 13.

Phoenix Ins. Co. v. Wulf, 9 Biss. (U.S.) 235.  
 " " " " " Cas. Eq. Pl. & Pr., 144.

In Michigan a subpoena issued by a circuit court in chancery may be served anywhere within the state on or before the return day thereof. It may be served by the sheriff of any county or by any other person. It is served by delivering a copy of the writ subscribed by the complainant, his solicitor, the officer or person serving the same, inscribed copy and showing the original, under the seal of the court, at the time of such delivery, to the defendant.

Mich. Ch. Rule 4 b.

Creveling v. Moore, 39 Mich., 543.

Soule v. Hough, 45 Mich., 418-422.

If service is made by an officer he makes an official return of the fact. If service is made by a person delegated by the United States court, or by a private person in this state, the return of service must be under oath.

U. S. Rule 15.

If a subpoena is returned not served upon a defendant, the complainant is entitled to another subpoena against such defendant, until due service is made.

U. S. Rule 14, Mich. Rule 4 a.



The statutes of this state provide that when personal service cannot be had on account of the defendant being a non-resident absent from his home, or concealed, that substituted service may be obtained by publication.

How. St. §§ 6670-6686.

The United States statutes provide for substituted service by publication in suits to enforce a lien upon, or claim to, or to remove any incumbrance, lien or cloud, upon the title to any real or personal property within the district wherein the suit is brought, if one or more of the defendants shall not be an inhabitant of, or found within the district.

18 Statutes at Large, 472.

Under the United States statute when there has been substituted service the defendant may appear within one year, have the decree opened and be permitted to defend. Under the Michigan statute he has for that purpose seven years, unless notice of the decree has been served upon him, in which event the time within which the decree may be opened is limited to one year.

When the plaintiff has obtained personal service upon the defendant of the subpoena, or substituted service, he has completed in full the first step in a suit in equity. The suit, however, was actually commenced by filing the bill issuing a subpoena and placing it in the hands of an officer for service.

Peck v. Germain F. Ins. Co., 102 Mich., 52.

The defendant having been served with process, the rules require that he shall appear and defend by demurring, pleading, or answering within a certain time. At the present time if the defendant is not laboring under some personal disability it is seldom necessary to the plaintiff's cause that he should appear. There may still be cases, however, when discovery is required, and in such a case the defendant may be compelled to appear by attachment.

U. S. Rule 18.

Riopelle v. Doellner, 26 Mich., 102.

Thompson v. Wooster, 114 U. S. 104.

#### ENTERING DEFENDANT'S DEFAULT.

If the defendant fails to appear, or, having appeared, fails to demur, plead, or answer, his default therefor may be entered, and the cause proceed *ex parte*.

If the defendant's default is entered for his not appearing and answering, pleading or demurring within the prescribed time, the effect is the same as though he had appeared and answered, admitting all the material allegations of the bill.

Thompson v. Wooster, 114 U. S., 104.

" " Cas. Eq. Pl. & Pr., 147.

Ward v. Jewett, Walk. Ch., 19, 45.

Covill v. Cole, 16 Mich., 223.

A decree may then be taken by the complainant, termed a decree *pro confesso*. Such decree must be limited strictly to the case made by the bill. Those allegations, and those only, has the





defendant by his default admitted to be true. If, therefore, the complainant should find it necessary to amend his bill and add new material allegations, the effect of the amendment will be to violate the order taking the bill as confessed, and new process must issue and be served upon defendant and the same proceedings had as though the suit had been commenced *de novo*.

Harris v. Deitrich, 29 Mich., 366.

If the order to take the bill as confessed is entered for default of the defendant's appearing, the cause proceeds *ex parte*, and the defendant is not entitled to notice of further proceedings, but if his default is for not answering, pleading or demurring after having appeared, the cause proceeds *ex parte* as before, but the defendant is entitled to notice of each subsequent step in the cause.

Mich. Ch. Rule 15, Law R., 35.

Warren v. Juif, 38 Mich., 662.

Watson v. Hinckman, 41 Mich., 716.

The entry of an order taking a bill for divorce *pro confesso* on account of defendant's default in not appearing or answering, pleading or demurring, does not have the effect of making the allegations in the bill evidence for the complainant. The public are interested in preserving the marriage contract. As we have seen, such bills must be verified. They must contain distinct allegations that the bill is not filed in collusion with the defendant, directly or indirectly, and the allegations contained in the bill as to the grounds of divorce must be established by satisfactory proof. And the officer before whom the proofs are taken is required to make such full inquiries of the witness as shall be necessary to arrive at all the material facts in the case.

Emmons v. Emmons, Walk. Ch., 532.

Pugsley v. Pugsley, 9 Paige, 589.

If one of the defendants is incompetent to appear in person, being an infant, *non compos*, etc., he must appear by a guardian *ad litem*, and if he neglects to so appear, the court will upon application by petition of the plaintiff appoint such guardian and the mere neglect of the infant or other incompetent person does not authorize the plaintiff to enter a default. If there is an infant defendant the complainant will not be entitled to a decree upon the bill simply taken as confessed. He must establish his case by testimony, for the reason that an infant is a ward of the court.

Thayer v. Love, Walk. Chy., 200.

Chandler v. McKinley, 6 Mich., 216.

Smith v. Smith, 13 Mich., 258.

If one of the defendants is beyond the jurisdiction of the court, or has secreted himself so that personal service cannot be had, the statute provides for substituted service, steps must be taken to make such substituted service. Affidavit is made that the defendant is a nonresident, or that he has concealed himself, etc., and upon this affidavit the court makes an order that the defendant appear and answer within the time prescribed in the statute and that notice of such order be published, etc., in a



certain newspaper. The statute specifies the time within which the order must be published and the length of time. If the defend- and does not appear within the period fixed by the order and answer upon filing proof of that fact an order may be entered taking the bill as confessed.

2 How. An. St. §§ 6670, 6671, 6672.

\*\*\*\*\*



## C H A P T E R X.

-----

## APPEARANCE OF DEFENDANT, ETC.

The defendant having been served with process must cause his appearance to be entered in the common order book within the time prescribed by the rules, and serve a notice of such appearance upon complainant, if he would prevent his default being entered and an order made taking the bill as confessed.

1 Barb. Ch. Pr., 73;  
 Jennison Ch. Pr., 40;  
 Mich. Rules 5 a, 7 b;  
 U. S. Rules 17, 11.  
 Flint vs. Comly, 95 Me. 251.  
 " " " Cas. Eq. Pl. & Pr. 135.

Under the Michigan practice the defendant must appear within fifteen days after being served by subpoena and serve notice of such appearance upon complainant's solicitor. He may demand a copy of the bill in which case it must be served within fifteen days after such demand.

Ch. Rule 5 a, b, c.

The defendant having appeared, if the occasion exists, may except to the bill on the ground that it contains impertinent or scandalous matter, and in the United States court he may also except if it is made unnecessarily prolix by recitals of matters not pertinent, or relevant to the real cause of action, or by needless repetitions.

Upon exceptions of this nature being filed they may be referred to a master. If the master or the court find that the exceptions are well taken, the objectionable matter will be expunged at the expense of complainant, and he may be adjudged to pay all the defendant's costs up to that time.

U. S. Rules, 23, 23, 27.

Impertinences are wholly irrelevant or unnecessary allegations and statements, and they have been described to be "when the records of the court are stuffed with long recitals, or with long digressions of matters of fact, which are altogether unnecessary and totally immaterial to the matter in question; as where a deed is unnecessarily set forth in hæc verba." The test as to whether a particular allegation is or is not impertinent is this, Is it material? If it is not material it is impertinent, but its immateriality must clearly appear. If the court is in doubt, the matter will not be stricken out as impertinent.

Rickards vs. Attorney-Genl., 13 Cl. and Fl., 30;  
 Railroad vs. Stewart, 4 C. D. Green, 343;  
 Whaley vs. Norton, 1 Vern., 463;  
 Clark vs. Periam, 2 Atk. 333; 337.  
 Woods vs. Morrell, 1 Johns. Ch., 103.



Scandal is an irrelevant allegation of some matter which is unbecoming the dignity of the court to hear, or is contrary to good morals, or which charges some person with the commission of a crime not necessary to be shown in the cause; in short any unnecessary allegation bearing cruelly upon the moral character of an individual. Nothing is scandalous, however, which is relevant. A man may be called a thief when that fact is pertinent to the issue involved.

Fisher v. Owen, 8 Ch. Div., 645;  
 Gleaves v. Morrow, 2 Tenn. Ch., 592;  
 Goodrich v. Rodney, 1 Minn., 195;  
 Desplaces v. Goris, Edw., Ch., 350.

The objection to the bill for impertinence must be taken before answering or submitting to answer, i. e., obtaining an extension of time within which to answer.

But an objection for scandal may be taken after answer. The reason for the distinction is that impertinence involves merely a question of costs, while scandal is regarded as an indignity to the court.

Anon, 2 Vesey, Sen. 630;  
 Ferrar v. Ferrar, 1 Dick., 173;  
 Anon, 5 Vesey, Jr., 656;  
 Jones v. Spencer, 2 Penn. Ch., 776.

And the objection to the bill for scandal may be made by one not a party to the suit.

Coffin v. Cooper, 6 Ves., 513.  
 Williams v. Douglas, 5 Beav., 82, 86.

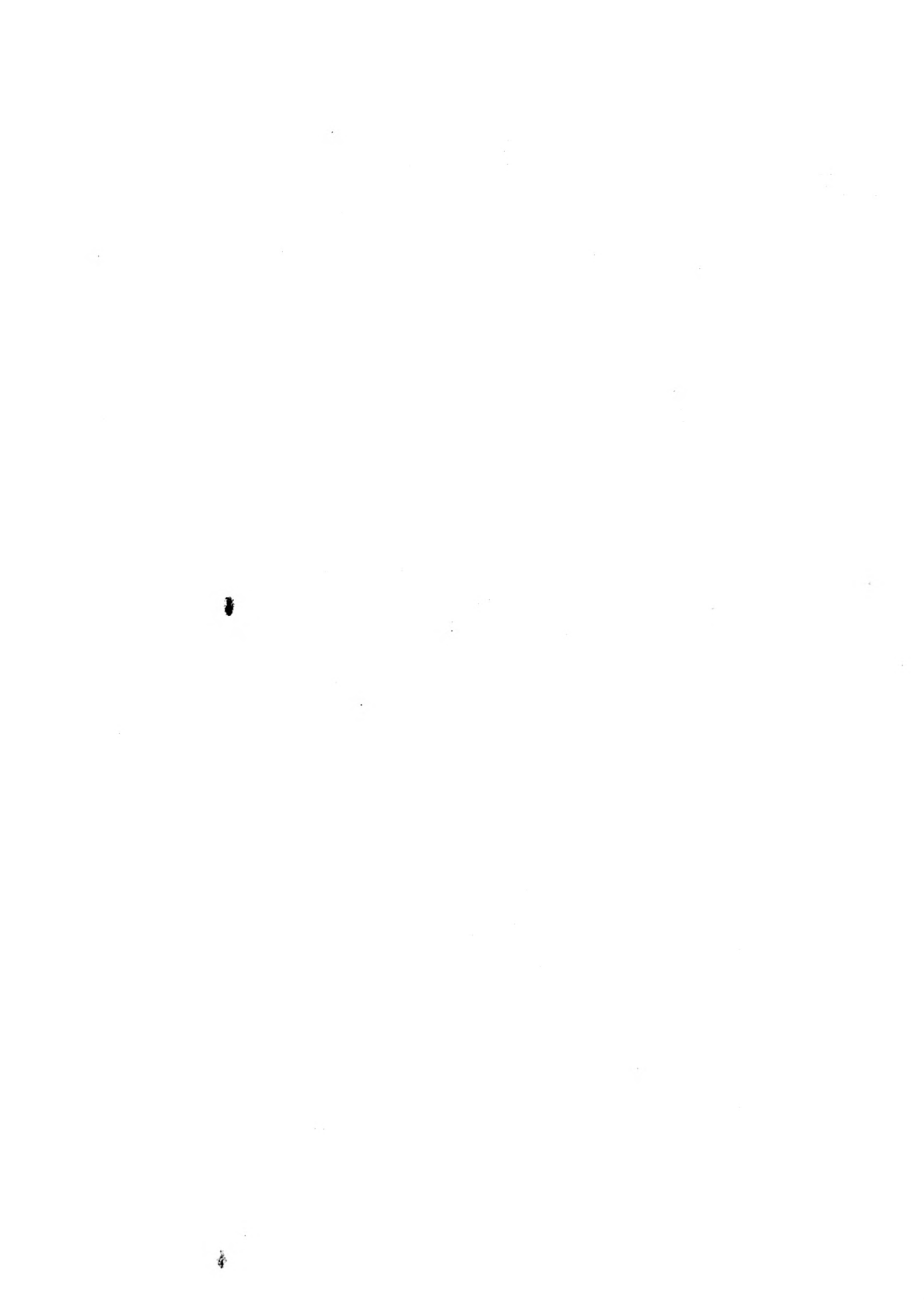
#### DISCLAIMER.

If the defendant has no interest whatever in the subject-matter of the suit, and never had any, and never claimed to have had any, he may answer by disclaiming all interest in the proceedings. A simple disclaimer, however, is seldom sufficient, except in those cases where the defendant has been made a party by mistake. If, as a matter of fact, although the defendant, may not, at the time the suit was commenced, have any interest in the subject-matter of the controversy, if he once had and has since parted with such interest, he may be called upon to disclose to whom he has assigned the interest, that the complainant may make the assignee a party defendant.

Spofford v. Manning, 2 Edw. Ch., 358;  
 Ellsworth v. Curtis, 10 Paige, 105.

A mere disclaimer is not sufficient if the defendant is charged with being a party to a fraud, or, if the allegations of the bill show that the defendant has so entangled himself up with the whole transaction that the complainant was obliged to make him a party, for in such a case the complainant is entitled to an answer explaining the defendant's conduct.

Isham v. Miller, 44 N. J. Eq. 61;  
 " " " Cas. Eq. Pl. & Pr. 161;  
 Graham v. Cooper, 9 Sim., 95, 102;  
 Glassington v. Thwaites, 2 Russ., 456.





And whenever the complainant is entitled to make any person a defendant in any given case, such person cannot avoid the suit by a disclaimer, and if the complainant is entitled to an answer he must answer.

Glassington v. Thwaites, 2 Russ., 458, 462;  
 Dobree v. Nicholson, 22 L. T. M. S., 744;  
 Isham v. Miller, 44 N. J. L., 61;  
 Bromberg v. Fyer, 69 Ala., 22;  
 Graham v. Coape, 3 Myl. & Cr., 638.

If there is no objection to the bill on the ground that it contains impertinent or scandalous matter, and the defendant desires to interpose a defence, the next step for him to take will depend entirely upon the nature of his defence. For example, A may have filed a bill to enforce a contract made with B by the terms of which B agreed to sell a certain parcel of land for a given sum to A. B's defence may be that the contract is void, not having been reduced to writing, and the fact that it was not reduced to writing may or may not appear upon the face of the bill, or B's defence may be that the contract is void on account of some fraud or imposition practiced by A whereby he was induced to execute the contract-- or in other words, the defence may consist of:

1. Some objection to the case made by the bill which appears upon the face of the bill, showing that the complainant has no cause of action; or,
2. There may be some fact not appearing upon the face of the bill, and not going to the merits of the cause, which will prevent the court from taking cognizance of the cause; or,
3. The defence may go to the merits of the complainant's cause, the defendant claiming that upon all the facts and circumstances that the plaintiff is not entitled to any relief.

These several defences have each a particular form in which they are to be presented.

If the defence is based upon some matter which appears upon the face of the bill, it is by demurrer.

Insurance Co. vs. Field, 2 Story 50.

If the defence rests upon some one particular fact which does not appear upon the face of the bill, it may be by plea, which brings to the attention of the court the special defence relied upon. The plea is a special answer.

Story Eq. Pl. 437.

If the defence rests upon the actual merits of the defendant's case, the defence is by a general answer.

Story Eq. Pl. 437.

#### DEMURRER.

A demurrer is the proper mode of defence, when the ground of defence is a defect in the frame of the bill or in the case made by it, or the matter contained in it.

Jones v. Earl of Strafford, 3 P. Wms., 79, 80;  
 Mitfords' Eq., 206.



Lord Coke says that the word demurrer comes from the latin demorari, to abide; and therefore, he that demurreth in law, is said to abide in law; moratur, or demoratur in lege. The pleader stops, abides, demurs, in short, submits the case to the court and demands of the court its judgement, whether, in law, he can be required to proceed. Co. Litt. 71 b; 3 Black. Com., 314.

The demurrer alleges in substance that if the matters contained in the bill were true they do not sustain the complainant's contention, or that, for some reason apparent on the face of the bill, or because of the omission of some matter, which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer, and it therefore demands the judgement of the court whether the defendant shall be compelled to answer the complainant's bill, or that particular part of it to which the demurrer applies. Mitford's Eq. 88; Mich. Ch. P. 8.

When it is clear, absolute and certain, that taking the charges made in the bill to be true the bill will be dismissed at the hearing, a demurrer will lie, but not if there is uncertainty in that regard.

Atterson v. Fair, 2 Ves., 94;  
S. C. 4 Bro. C. C., 270;  
Havenden v. Md. Annesley, 2 Sch. & Lef., 607;  
Brooks v. Hewitt, 3 Ves., 253.

But while the demurrer assumes and confesses, for the purposes of the argument, that the allegations in the bill are true, the admission extends only to such matters as are well pleaded, matters of fact, and not matters of law, nor false allegations of fact of which the court is bound to take judicial notice. And when there are matters of fact pleaded which are repugnant to some other, that one is admitted, which is of least benefit to the pleader.

Looke v. Polle, 3 Ves., 4-7;  
Campbell v. Mackay, 17. & Cr., 303, 613;  
Vales v. Bank of Mich., Har. Ch., 308;  
Griffing v. Gibb, 2 Black U. S., 519;  
Roby v. Cositt, 78 Ill., 638;  
Croft v. Thompson, 31 N. H., 358;  
1 Green. Fv. 4, 8.

While the demurrer admits all relevant allegations well pleaded it does not admit conclusions drawn from facts stated.

Lea. v. Robeson, 12 Gray 280;  
Interstate Land Co. v. Maxwell Co., 139 U. S., 569;  
National Park Tk. v. Halle, 30 Ill. App. 17;  
Cornwell v. Green, 45 Fed. Rep. 105.

An allegation of fraud is not admitted, but only the facts, fraud being a conclusion of law.

Fogg v. Blair, 139 U. S., 116;  
Preston v. Smith, 20 Fed. Rep., 664;  
Walton v. Weitwood, 73 Ill., 125.



The demurrer may go to the whole bill or to only a part of the bill. There may be a demurrer to the whole bill, or demurrers to parts of the bill, and demurrer to parts of a bill may overlap each other. If the demurrer does not go to the whole bill it must point out clearly the part of the bill covered and not by way of exception, as "all of the bill except those parts answered."

Robinson v. Thompson, 2 Ves. 87. 116;

Salkeld v. Science, 2 Vos., 107.

When there are several demurrers to the several parts of the bill and some are good and others bad, those that are good will be sustained and the others overruled. When there is a demurrer to the whole bill and a demurrer to a part of it and the demurrer to the whole bill is overruled and the other sustained, so much of the bill as is covered by it is dismissed and the defendant must answer the residue.

Giant Pow. Co. v. Cal. Pow. Works, 98 U. S., 126;

Canton Warehouse Co. v. Potts, 38 Miss., 637;

Brandon Mfg. Co., v. Pime, 14 Blatch., 371.

A demurrer may be to the relief prayed, or to the discovery or to both. But the demurrer must not be both to discovery and relief if the complainant is entitled to either; if the demurrer is to the whole bill and the complainant is entitled to either discovery or relief it will be overruled.

Livingstone v. Story, 9 Peters, 638;

Wright v. Dame, 1 Met., 237- 241;

Holmes v. Holmes, 38 Vt., 525, 537;

Laight v. Morgan, 1 Johns. Cas., 434;

Higinbotham v. Burnet, 5 Johns 16 ;

" " " Cas. Eq. Pl. 3 Pr. 163.

-----:O:-----



## CHAPTER XI.

----:::----

## DEMURRERS (Continued).

A demurrer to relief is in effect submitting the proposition that the plaintiff has not made or stated such a case, for some reason, appearing on the face of the bill, as entitles him to relief. It may therefore be :

- I. To the jurisdiction.
- II. To the person.
- III. To the matter of the bill either in substance or in form.

## I. JURISDICTION.

A demurrer to the jurisdiction may be:

- I. That the case made by the bill does not fall within that of any class of causes over which the court assumes jurisdiction.

A discussion of the cases that fall under this head properly belongs to the subject of equity jurisdiction.

Stephenson v. Davis, 36 Me., 73, 74;

Cookney v. Anderson, 31 Beav., 432.

2. That the subject-matter of the suit is within the jurisdiction of some other court.

If it appears that the subject matter of the suit is within the exclusive jurisdiction of some other court, the probate court, etc., or, that the complainant has as effectual and complete a remedy at law as in equity the bill is demurrable.

Lynch v. Willard, 3 Johns. Ch., 342;

Bank v. Lee, 11 Conn., 111;

Hammond v. Messinger, 9 Sim., 327.

## II. TO THE PERSON.

If it appears on the face of the bill that the complainant cannot maintain the suit on account of some personal disability under which he is laboring, for instance, that he is an infant, or for any other reason incompetent, or that the defendant is privileged from being sued, i. e., the state, etc., the objection can be taken by demurrer.

## III. TO THE MATTER OF THE BILL.

Demurrers arising from objections to the matter of the bill are either to the substance of the bill or to the form in which it is stated. Since the complainant is required to state facts in his bill which entitles him to relief assuming that they are true, the omission of any essential averment will sustain a demurrer.





Demurrers to the substance are:

1. That the plaintiff has no interest in the subject.
2. That the defendant is not answerable to the plaintiff.
3. That the defendant has no interest.
4. That the plaintiff is not entitled to the relief he has prayed.
5. That the value of the subject-matter is insufficient to give the court jurisdiction.
6. That the bill does not embrace the whole of the subject-matter.
7. That there is a want of proper parties.
8. That the bill is multifarious.
9. That the plaintiff's remedy is barred by lapse of time.
10. The Statute of Frauds.
11. That there is another suit pending for the same matter between the same parties.

1. If there are several plaintiffs some of them having an interest and others none in the subject-matter, a general demurrer to the whole bill is a good defence.

King of Spain v. Machado, 4 Russ., 224;  
Clarkson v. DePeyster, 3 Paige, 336- 339;  
Atwell v. Ferrett, 2 Blatch, C. C., 39.

2 & 3. If the plaintiff has an interest the bill must show the defendant answerable to him.

Ld. Uxbridge v. Stoveland, 1 Ves. Sen., 55;  
Crossing v. Honor, 1 Vern., 180;  
White v. Smale, 22 Beav., 72.

4. When the plaintiff prays merely for some special relief to which he is not entitled, or to any relief of the same nature.

Pollins v. Forbes, 10 Cal., 299;  
Bleeker v. Bingham, 3 Paige, 246;  
Dike v. Grant, 4 R. I., 285;  
Sayles v. Tibbitts, 5 R. I., 285.

5. If it does not appear on the face of the bill that the matter in controversy is sufficient to give the court jurisdiction, the defendant may move to strike the bill off from the file or demur.

Carr v. Inglehart, 3 Ohio St., 456;  
McElwain v. Willis, 3 Paige, 503;  
S. C. 9 Wend., 548.

6. The court will not permit a bill to be brought for a part of the matter only, but requires that every bill shall be so framed as to afford ground for decision upon the whole matter at one and the same time.

Panfoy v. Panfoy, 1 Vern., 29;  
Margrov v. Le Hooke, 2 Vern., 207;  
Jones v. Smith, 2 Ves., 372.

7. When it appears upon the face of the bill that the interest of persons will be effected who are not made parties the defendant may demur.



Att'y-Genl. v. Poole, 4 M. & C., 17;  
 Robinson v. Smith, 3 Paige, 222;  
 Story Eq. Pl. Sec. 343.

8. A demurrer for multifariousness goes to the whole bill and it is not necessary to specify the particular parts of the bill which are multifarious.

Dimmock v. Bixby, 20 Pick., 366;  
 Gibbs v. Claggett, 2 Gill. & J., 14;  
 Boyd v. Hoyt, 5 Paige, 65.

9. The Statute of Limitations of 21 Jac. 1, c. 16, did not in terms include equitable actions, but courts of equity have been disposed to treat a claim as stale that was barred at law, and in short to be governed by the statute.

Miller v. McIntyre, 6 Peters 61;  
 Denny v. Gilman, 26 Me., 149, 154;  
 Robinson v. Hook, 4 Mason, 139, 150;  
 Brown v. Buena Vista, 95 U. S., 157.

10. If it clearly appears on the face of the bill that the contract upon which the complainant rests his claim is within the statute of frauds, the objection can be taken advantage of by demurrer.

Field v. Hutchinson, 1 Beav., 399, 600;  
 Crenston v. Smith, 6 R. I., 231;  
 Dudley v. Bachelder, 58 Me., 403, 406.

11. If it appears, also, that there is another suit pending in another court, in which the complainant could obtain the same relief, the defendant may demur for that reason.

Peareth v. Peareth, 5 Jur. F. S., 60.

The grounds of demurrer to a bill by reason of deficiency in matters of form are:

1. Omission to state complainant's residence.
2. Neglect to state positively, allegations within the complainant's knowledge.
3. Lack of certainty in the bill.
4. Failure of the complainant to offer to do equity.
5. Want of counsel's signature to the bill.
6. Neglect to verify in those cases where the statute or rules require the bill to be sworn to.

The above grounds of demurrer are simply an enumeration of the essentials of a bill in equity which we have already pointed out.

#### DEMURRER TO DISCOVERY.

The defendant may not only demur to the relief, but he may demur to the discovery sought when the complainant is entitled by his bill to relief. The several grounds of demurrer to discovery are:

1. That the discovery may subject the defendant to some penalty or forfeiture. The defendant will not be required to either criminate himself or place himself in a position in which he may be prosecuted.



Harrison v. Southcote, 1 Ark., 339;  
Duke v. Harper, 66 Mo., 51;  
Allyn v. Hanna, 47 Iowa, 264;  
McPherson v. Cox, 93 U. S., 404.

2. Because in equity and good conscience the defendant's right is equal to the complainant's. If, for example, the defendant has in conscience as good a title, but not as perfect a legal title as the complainant, he will not be compelled to make a discovery which will endanger his own title.

Howell v. Asham, Stockt. (N. J. ) 81;  
Glegg v. Legh, 4 Mad., 104;  
Story Eq. P. Secs. 603, 604.

3. Because the discovery sought is immaterial to the relief prayed. The complainant is not entitled in equity any more than at law to introduce immaterial evidence. Therefore, if he calls upon the defendant to answer interrogatories in reference to some matter which is immaterial, the defendant may demur to that much of the discovery for immateriality.

Lord Montague v. Dudman, 3 Ves. Sen., 396, 398;  
Baker v. Pritchard, 2 Atk., 388;  
Hincks v. Milthrope, 1 Vern., 204.

4. Because the discovery would be a breach of professional confidence. All confidential communications between attorney and client, husband and wife, physician and patient, priest and penitent, may not be disclosed in any proceeding, either at law or in equity. And if the plaintiff seeks to have the defendant make any such disclosure, he may demur to that part of the discovery, if it appears on the face of the bill that the information is in fact confidential.

State v. White, 19 Kan., 445;  
Insurance Co. v. Schaffer, 94 U. S., 457;  
Bigler v. Peyher, 43 Ind., 112;  
Barham v. Roberts, 70 Ill., 19.

5. That the discovery relates only to the defendant's case. The complainant is not entitled to obtain from the defendant a disclosure of facts material only to the defence. For example, where the plaintiff and defendant claim through adverse sources of title, the one is not entitled to the other's evidences of title.

Ingilby v. Shafto, 33 Beav., 31;  
Joy v. Kekewick, 2 Ves. Jr., 679;  
Baden v. Bore, 2 Ves. Sen., 445;  
Moore v. Caron, L. R., 7 Ch. App., 94, note.

6. That the discovery might be injurious to the public interest. This ground of objection is confined to information which the defendant has obtained while occupying a public or semi-public position.

Bellows v. Stone, 18 M. H., 485, 485;  
1 Greenl. Ev. Secs. 250, 251.

Any irregularities in the frame of the bill which may be taken advantage of by demurrer, will be deemed to have been waived if the defendant consents to answer.



Reedy v. Scott, 25 Wall., 352, 385;  
 Hubbard v. Turner, 3 McLean, 518, 576;  
 Campbell v. Foster, 2 Tenn. Ch., 402.

#### SEPARATE DEMURRERS.

The defendant may put in separate and distinct demurrers to separate and distinct parts of the bill for separate and distinct causes, and in that case one demurrer may be sustained and another overruled.

Each demurrer must be good to so much of the bill as is covered by it. If it covers too much of the bill it is said to be good in part and bad in part, and will be overruled. Demurrer is a mere name and designation of a defence appearing on the face of the bill. If that particular defence goes to the whole bill, a general demurrer for that cause is good. But if the particular defence appearing upon the face of the bill does not go to the whole bill a general demurrer is not good. If, for instance, it appears that the bill calls for discovery as to several matters and as to one of those matters the information called for was obtained by the defendant confidentially when the relation of penitent and confessor existed, a demurrer to so much of the bill as calls for that particular discovery would be good, but if the demurrer was to the whole bill it would still be good as to that particular part of the bill but bad as to the residue of the bill and would therefore be overruled. In other words by demurring, you simply announce that you have a defence to the whole bill, or, to that part of it demurred to, as appears from the bill itself, and then you state what that defence is, technically assign cause. If that defence, the cause assigned, is good to so much of the bill as you have demurred to, the demurrer is sustained, but if it is not a good defence to so much of the bill as you have demurred to it is overruled, because it is no defence to a part of the bill covered by it. A demurrer cannot be good in part and bad in part.

Mayor of London v. Levy, 8 Ves., 395, 403;  
 Baker v. Mellish, 11 Ves., 68, 70;  
 Barstow v. Smith, Walk. Ch. 394;  
 Railroad v. Schuyler, 17 N. Y., 592.

There may be several defects in the bill, or, in so much of it as is covered by the demurrer, and the demurrer may point out each of such defects; in that case if either of the defects is a good defence, although the others are not the demurrer will be sustained.

When more than one of the defendants join in a demurrer and the demurrer is good as to one and is bad as to the other, it will be allowed as to the one and overruled as to the others. It is not considered good in part and bad in part, but is treated as the separate demurrer of each defendant.

Mayor of London v. Levy, 8 Ves., 395, 403.





## CHAPTER VII.

--:0:--

## FORM OF DEMURRER.

The demurrer must be entitled in the cause. Indeed, all the papers filed in a cause, or served after the bill is filed, are to be entitled. Following the title is the heading, indicating whether it is a joint or several demurrer, whether it is to the whole or part of the bill, and if to a part, whether it is accompanied by a plea, or answer, or both. Then comes the protestation of the defendant as to the truth of the matters contained in the bill. The object of this protestation is to avoid a tacit admission, wither in this or some other suit of the truth of the averments in the bill. This clause may be omitted in Michigan.

Story Eq. Pl. Secs. 452, 457.

Mich. Ch. R. 9 a.

The demurrer then proceeds, if it is to a part and not to the whole bill, to point out distinctly those parts of the bill to which it applies. The rule given by Lord Redesdale, is: "That where a defendant demurs to part, and answers to part of a bill, the court is not to be put to the trouble of looking into the bill or answer to see what is covered by the demurrer; but it ought to be expressed in clear and precise terms what it is that the party refuses to answer, and I cannot agree that it is the proper way of demurring to say that the defendant answers to such a particular fact and demurs to all the rest of the bill; the defendant ought to demur to a particular part of the bill, specifying it precisely."

Doemsher v. Hewenham, 2 Sch. & Lef. 199, 205;

Atwell v. Percett, 2 Blatch C. C., 39;

Story Eq. Pl. Secs. 457, 458.

Since a demurrer cannot be good in part and bad in part, the pleader should put in separate demurrers to separate parts of the bill, when he is in doubt whether a given ground of demurrer covers more than one part of the bill. But where there are two or more separate demurrers to different parts of the bill, each must point out distinctly what part of the bill each is intended to cover.

Mynd v. Francis, 1 Anst., 5;

Burch v. Coney, 14 Jur., 1009.

## GENERAL AND SPECIAL DEMURRERS.

The pleader must always assign one or more causes of demurrer, that is, point out the defects in the bill or that part of it to which he has demurred. If he points out the specific defects he is said to demur specially; if he merely points out that "the complainant has not made or stated such a case as entitles him to the relief prayed, or, to any relief" he is said to have demurred



generally. A general demurrer is usually sufficient when the defect is a matter of substance.

Wilson v. Hill, 46 N. J. Eq., 367;

Stewart v. Flint, 57 Ver., 216;

Ward v. Clay, 82 Cal., 502;

Bidder v. McLean, L. R. 20 Ch. D., 512;

Essex Paper Co., v. Greacen, 45 N. J. Eq., 504.

A defendant may demur generally to the whole bill, and assign as cause want of equity, without being more specific:

1. When the facts stated are insufficient to entitle the plaintiff to relief.

2. When he has omitted to verify the bill, when that is necessary.

3. When he has neglected to offer to do equity in cases where such an offer ought to be made.

4. When the allegations of fact within the personal knowledge of the complainant are not made with sufficient positiveness.

The reason for the rule in all these cases is that the plaintiff, by his bill, does not bring his case within the description of cases over which the court exercises jurisdiction.

Caren v. Johnson, 2 Sch. & Lef., 280;

2 Danl. Ch. Pr., 1 Ed. 73.

Some cause for demurrer must be assigned. If no cause is assigned the demurrer is bad.

Duffield v. Graves, Carey 87;

Nash v. Smith, 6 Com., 421;

Howland v. Venosha, 19 Wis., 264.

If the demurrer is general and the complainant is entitled to any relief under his bill, the demurrer will be overruled.

Shaw v. Chase, 77 Mich., 430;

Darrah v. Boyce, 82 Mich., 480;

Northern P. R. R. v. Roberts, 42 Fed. Rep., 734.

The pleader may always point out specific objections, and in some cases, he is required to do so. When there is a want of parties, he must point out who the proper parties are, and also multifariousness.

Royner v. Julien, 2 Dick., 677.

Objections for want of jurisdiction and want of equity should be taken by separate demurrers.

Barver v. Barber, 5 Jur. N. S., Part I., 1197.

Several causes for demurrer may be assigned in support of a demurrer and if either one of them is good the demurrer will be sustained, although the other causes assigned are bad.

Canton Warehouse Co. v. Potts, 66 Miss., 637.

Since a general demurrer is good, whether it does or does not point out specifically all the defects of substance appearing on the face of the bill with the same particularity as must be done in a special demurrer, there is nothing gained by not pointing them out, except you may possibly in that way keep the complainant ignorant of your real objection.



## SPEAKING DEMURRER.

In assigning cause for demurrer, the cause assigned must appear on the face of the bill; no new fact may be imported into the bill. A demurrer which alleges a fact not contained in the bill is termed a speaking demurrer and for that reason will be overruled.

Edsall v. Buchanan, 4 Bro. C. C., 254;

S. C. 2 Ves. Jr. 83;

Brooks v. Gibbons, 4 Paige, 375.

Should the fact imported be immaterial and not relied upon to support the demurrer, it will be treated as surplusage.

Jones v. Charlemont, 12 Jur., 532;

Kuypus v. Reformed Dutch Church, 6 Paige, 570;

Davis v. Williams, 1 Sim., 5, 8.

One or more causes for demurrer may be assigned in its support, and the pleader may at the hearing of a demurrer, also assign one or more causes of demurrer in addition to those already assigned. This is called demurring ore tenus. Causes of demurrer assigned ore tenus must, however, be co-extensive with the demurrer filed. A cause of demurrer which goes to a part of the bill cannot be assigned ore tenus upon the argument of a demurrer to the whole bill.

Robinson v. Smith, 3 Paige 222;

" " " Cas. Eq. Pl. & Pr. 163;

Crouch v. Hickin, 1 Keen, 385;

Pitts v. Short, 17 Ves., 213, 216;

Rump v. Greenhill, 20 Beav., 512;

Thompson v. University of London, 10 Jur. N. S.,  
669, 671.

By the former rules of the court, the demurrer would be overruled by a plea or answer to the whole or any part of the bill covered by the demurrer, for the reason that the question submitted to the court by the demurrer was whether or not the defendant should be compelled to plead or answer, and if in the meantime the defendant had plead or answered the decision of the court was unnecessary and the demurrer was overruled.

Tidd v. Clare, 2 Dick., 712;

Clark v. Phelps, 6 Johns. Ch., 214.

This former rule has been materially modified by recent Michigan and U. S. rules.

Mich. Rule 8 g. h; U. S. Rules 36, 37;

Hayes v. Dayton, 18 Blatch., 420, 426.

The demurrer must be signed by counsel, but since it relies upon matters appearing upon the face of the bill it need not be signed by defendant or sworn to. It must be filed and a copy served upon the solicitor for the complainant within the time prescribed by the rules.

Mich. Rule 5 d; U. S. Rule 18.

Under the United States and Michigan practice a demurrer cannot be filed unless it is accompanied by a certificate of counsel,



that in his opinion it is well founded in law, and that it is not interposed for delay merely.

U. S. R. 31, Chy. R. 9 c.

#### ARGUMENT OF DEMURRER.

Either party may set the demurrer down for argument. In the United States courts complainant must set down the demurrer for argument, and if he neglects to do so, he will be presumed to admit its sufficiency, and the bill of complainant will be dismissed.

U. S. Rules 33, 38; Mich. R. 9 d.

Upon the argument of the demurrer the facts stated in the bill, or in that part of it covered by the demurrer, which are well pleaded and are relevant, as we have said, are admitted to be true. If the demurrer is sustained the court in effect says that the bill is insufficient in whole or in part, and the plaintiff's cause would, to that extent be finally disposed of, if he was not permitted to amend his bill. This permission is always granted upon request if the defect upon which the demurrer was grounded is one that the plaintiff can cure by an amendment.

Lord Comingsby v. Jekyll, 2 P. Wms., 300;

Bank of Michigan v. Viles, Walk. Ch., 398;

Mich. R. 9 e.

The effect of overruling a demurrer is to require the defendant to answer. The admission of the truth of the allegations of the bill made by the demurrer are admissions for the purpose of the argument solely, and consequently such admission does not entitle the complainant to a decree. He is no nearer a decree than he was before, except he has obtained the judgement of the court that his bill in form and substance is good and sufficient. The defendant is not required to ask the leave of the court to answer. He is required to answer. He by his demurrer asked the judgement of the court if he should be required to answer, and he has obtained that judgement, and must answer.

Sometimes when the court is in doubt it will overrule the demurrer and reserve the question of the sufficiency of the bill to the hearing.

Brownsword v. Edwards, 2 Ves. Sr., 245, 247;

Thomas v. Tyler, 3 N. & Coll., 255;

1 Danl. Ch. Pr. (5th Ed.) 267, 268, 465, 466;

Trafford v. Wilkinson, 3 Tenn. Ch., 448;

Forbes v. Turkeman, 115 Mass., 115.

It is discretionary with the court where a demurrer is meritorious, but it is overruled on account of some technical defect, to permit the defendant to demur a second time.

Devensher v. Newnham, 2 Sch. & Lef. 199;

Glegg v. Legh, 4 Mad., 207;

Thorpe v. Macauley, 5 Mad., 218;

Baker v. Nellich, 11 Ves., 36.





And some times when the bill has been so artfully drawn that, admitting its several allegations, the demurrer must be overruled, the court will permit the defendant to make the defence he sought to make by demurrer, by plea, putting in issue some fact fatal to the plaintiff's cause. But since but one dilatory defense is permitted without leave of the court, if the defendant desires to plead to the same part of the bill to which he has demurred, he must before filing his plea, obtain the leave of the court.

Fowler v. Eccles., 1 S. & S., 512;

Hudson v. Hudson, 1 S. & S., 512, note.

Witford's Eq. (Tyler Ed.) 310.

While a demurrer in legal effect is a bar to the suit, if sustained, it is not a bar to a subsequent suit for the same cause of action. Where a cause is heard upon the merits, and the bill is dismissed absolutely, and not without prejudice, such dismissal is a bar to a subsequent suit.

Holmes v. Remsen, 7 Johns. Ch., 280;

Story Eq. Pl. Sec. 458.

Under the modern practice a demurrer does not lie to a plea or an answer.

Edwards v. Drake, 15 Fla., 230;

Crouch v. Kern, 38 Fed. Rep., 549.

Winters v. Cloitor, 54 Miss., 341;

Banks v. Manchester, 128 U. S., 244;

Travis v. Ross, 14 W. J. Eq., 254.

-----c00-----



## C H A P T E R XIII.

-----  
P L E A S.

There may be some single fact which is decisive of the rights of the parties to the cause. As we have seen, if this appears upon the face of the bill the defendant can take advantage of it by demurrer. If it does not appear upon the face of the bill it may be taken advantage of by plea.

Pleas are divided into three classes:

1. Pure or affirmative.
2. Negative.
3. Anomalous.

This division is due primarily to the allegations contained in the bill with reference to the fact pleaded.

The complainant may, in his bill, make no reference whatever to the fact which is a complete bar to his action. In that case all that is necessary for the defendant is to plead such fact affirmatively, i. e., to aver by plea the existence of such fact. Such a plea is an affirmative plea. Again, the bill may state affirmatively the existence of some particular fact upon which his whole right of action depends, and that particular allegation may be false. It is necessary for the defendant in such a case to plead the non-existence of that particular fact alleged, to negative that much of the bill. Such a plea is a negative plea. Or again, the complainant may set forth in his bill the apparent existence of a fact which is a complete bar to his action, and then allege certain other facts and circumstances which show that in truth, it is no bar. In such a case the plea must affirm the existence of the fact admitted by the bill, and then negative all those facts and circumstances alleged in the bill tending to destroy its effect as a bar. Such a plea is an anomalous plea.

It will be noticed at the outset that pleas differ materially from demurrers. A demurrer takes the bill as drawn and assuming that all its allegations are true, points out some defect appearing upon its face. Such defect very seldom goes to the very heart of the plaintiff's cause of action. It is usually some fact showing a disability in the parties, want of jurisdiction in the court, or some inherent defect in the case as stated. Pleas not only include all these special objections when they do not appear on the face of the bill, but they also include a large number of defences which go to the merits of the cause in some one particular, which are decisive of the suit upon the merits. The plea is therefore frequently in its nature a special answer to the case made by the complainant, and it is in its particular character as an answer which a plea possesses that we find the reason for certain rules that have been adopted with reference to them. As we



shall see hereafter, a plea is frequently ordered by the court to stand as an answer.

Farley v. Kittson, 120 U. S., 303.

" " Cas. Eq. Pl. & Pr., 183.

Hearst v. Corning, 3 Paige, 566.

" " Cas. Eq. Pl. & Pr., 177.

The plea must be single. It must present a single ground of defense which will be decisive of the controversy, or of so much of the plaintiff's claim for relief or discovery as is covered by the plea, and a plea presenting two or more grounds of defense is bad.

Nobkissen v. Hastings, 2 Ves., 83;

Whittred v. Brockhurst, 1 Bro. C. C., 404;

Coath v. Jackson, 6 Ves., 11;

Albany City Bank v. Dorr, Walk. Ch. 317, 322;

Nobkissen v. Hastings, 4 Bro. C. C., 253.

This rule does not preclude the pleader from setting forth in the plea all the facts tending to establish his single defence. Multifariousness in a plea is not produced by the averment of several separate and distinct facts, all of which tend to establish a single proposition, but by the averment of several propositions, either of which is a separate defence.

Fox v. Yates, 24 Beav., 271;

Harrison v. Southcote, 1 Atk., 523;

Hazard v. Durant, 25 Fed. Rep., 26;

Harrison v. Farrington, 38 N. J. Eq., 358.

The pleader may, however, sometimes obtain leave of the court to file a double plea. This is sometimes necessary, especially when the bill has been drawn with a double aspect. Thus, where a bill was drawn seeking to charge real estate with certain debts of the ancestor, and alleging that they were: 1. Made a charge by the will; and, 2, if not made a charge by the will, they were a charge from the fact that the ancestor was a trader. The court permitted a plea to be filed denying the allegation that the will made the debts a charge upon the real estate, and also that the ancestor was a trader, which would make them a charge under the statute.

Gibson v. Whitehead, 4 Mad., 129, 241;

Hardman v. Ellames, 5 Sim., 640;

Kay v. Marshall, 1 Keen, 190, 192.

When great inconvenience might otherwise be sustained by the defendant he is sometimes permitted to file a double plea.

Kay v. Marshall, 1 Keen, 190, 192;

McClosky v. Barr, 38 Fed. Rep., 165;

U. S. v. American Bell Tel. Co., 30 Fed. Rep., 523;

Bompton v. Binhall, 4 Beav., 558.

The reason for the rule that a plea must be single is that the advantage which a plea has over an answer in shortening the proceedings, would be destroyed if the pleader were permitted to introduce into his plea more than one defense. When he is permitted, by leave of the court, to plead more than one defence to the same bill, or the same plea, but file separate pleas.

Gibson v. Whitehead, 4 Mad., 129, 241;

Benson v. Jones, 1 Tenn. Ch., 498;

Brinkerhoff v. Brown, 7 Johns. Ch., 216;

Saltiers v. Tobias, 7 Johns. Ch., 214.



A plea cannot be made to perform the office of a demurrer. If it sets forth no new matter, but relies upon the allegations contained in the bill, it will be overruled.

Black v. Black, 15 Ga., 445;

Andrews v. Lockwood, 11 Jur., 956.

The plea must clearly and distinctly aver all the facts necessary to render it a complete defence to the case made by the bill so far as the plea extends. When such facts are within the knowledge of the defendant, they must be averred positively, but when they are not within his personal knowledge, they may be averred upon information and belief. All intendments against the pleader must be excluded by proper averments of facts, not conclusions of law.

Harrison v. Farrington, 38 N. J. Eq., 358.

" " Cas. Eq. Pl. & Pr., 173.

Parker v. Parker, Walk. Ch., 457, 458;

Madison v. Waltertown, 5 Wis., 173.

When the facts are not charged in the bill to be within the knowledge of the defendant, the defendant may in his plea negative the averment "to the best of his knowledge and belief."

Bolton v. Gardner, 3 Paige, 273;

Heartt v. Coming, 3 Paige, 566.

The plea must not aver conclusions of law, but the facts from which such conclusions may be drawn.

Farley v. Kitson, 120 U. S., 303;

Larimore v. Wells, 29 Ohio St., 13.

When the defendant pleads want of proper parties, that fact not appearing on the face of the bill, the objection must be made in a clear and explicit manner, and the plea, like the demurrer, must show who the proper parties are.

Robinson v. Smith, 3 Paige, 222;

Mitchell v. Lenox, 2 Paige, 280.

The plea of another suit pending for the same cause, and for like relief, is sufficient. The plea should set forth the general character and objects of such other suit, and the relief prayed.

Bank of Michigan v. Williams, Har. Ch., 219;

Radford v. Folsom, 14 Fed. Rep., 97;

" " Cas. Eq. Pl. & Pr., 191.

A plea of a stated account must aver that such account was just and fair.

Schwartz v. Wendell, Har. Ch., 395.

When the defence is based upon some fact which has arisen after filing of the bill, and before other defence is put in, it can be taken advantage of by plea, but if the defence has been made, it must be taken advantage of by supplemental or cross bill.

Payne v. Beach, 2 Tenn. Ch. 708;

Miller v. Fenton, 11 Paige, 18;

Lane v. Smith, 14 Beav., 49;

Wallace v. Dunning, Walk. Ch., 416.

It is within the discretion of the court to permit a plea to be amended when the application for the purpose shows mistake, inadvertence, etc.

Freeman v. Michigan Bank, Har. Ch., 311;

Greene v. Harris, 11 R. I., 5.





We have seen that a demurrer admits, for purposes of the argument, that all the facts well pleaded in the bill are true, but introduces no new fact. The purpose of the plea on the other hand, is to call the attention of the court to a fact not appearing on the face of the bill, which is a bar to the plaintiff's action; but while the pleader may deny any allegation of fact made in the bill, yet the plea admits all the allegations of the bill, which it does not by averment deny. It follows, therefore, that when there are any allegations of fact in the bill inconsistent with the plea, such allegations must be negatived by specific averments in the plea, otherwise the pleader would by his plea aver a fact and by the same plea constructively, but none the less positively, admit the truth of an allegation in the bill wholly at variance with his averment. It is therefore necessary for the pleader in drawing his plea, to examine the bill and to negative, by positive averment, every allegation contained therein which is inconsistent with the truth of the plea.

Formerly, one of the principal objects gained by a plea, was to prevent a discovery on the part of the defendant. It is evident that if the defence made by the plea goes to the whole bill, that the complainant has no right to discovery, since he has no right of action. Therefore, if there are no allegations in the bill which tend to negative the plea, or in other words, to disprove the existence of the particular fact which the plea avers and sets up as a special defence, the pleader is not required to make any answer to the bill whatever.

If, however, there are allegations of fact in the bill negativing the truth of the plea, the plaintiff is entitled to discovery, as to those particular facts. They are put in issue by the averments of the plea, and the plaintiff is entitled, as to them, to have the defendant's testimony. Consequently, the pleader must not only in his plea negative, by proper averments, all the allegations in the bill inconsistent with the truth of the plea, but he must also answer fully and explicitly, as to those allegations. Such an answer is said to be an answer in support of the plea.

These rules are applicable to all pleas whether pure, negative or anomalous.

*Wilson v. Hammonds*, L. R. 3 Lc. Cas., 323;

*Hunt v. Penrice*, 17 Beav., 532;

*Young v. White*, 17 Beav., 532.

We need not, of course, answer irrelevant questions or any interrogations in fact that he would be excused from answering if he was on the witness stand.

*Young v. White*, 17 Beav., 532;

*Lyell v. Kennell*, 8 App. Cas., 217.

\*\*\*\*\*



## L E C T U R E XIV.

-----  
PURE PLEAS.

A pure plea is one which avers some fact not appearing upon the face of the bill, as a bar to the plaintiff's claim.

2 Daniels Ch. Pr. (1884.) 97.

The theory upon which the pleader proceeds with the affirmative plea is, that, assuming the allegations of the bill to be true, there is a fact, or circumstance, not mentioned in the bill, which is a good and sufficient reason why the complainant should not be permitted to proceed with his suit. The court in order to save expense to the parties decides upon the validity of the objection, taking the bill, so far as it is not contradicted by the plea, as true.

## NEGATIVE PLEAS.

But there are cases in which some allegation made in the bill and which is absolutely essential to the complainant's right to be heard, is denied by the defendant. For instance A may file a bill against B, claiming to do so as the heir of C, and B may deny that A. is in fact the heir of C. This is called a negative plea, and always by its averments denies the truth of some allegation in the bill which is vital to the complainant's case. It was at first held that such a plea could not be filed. Lord Thurlow so decided in 1787 in a cause where the complainant claimed to be the heir of a certain person and the defendant sought by plea to deny that allegation in the bill.

Newman v. Wallace, 3 Bro. C. C. 143, 146;

Gunn v. Prior, 2 Dick., 257.

The Chancellor himself, however, afterwards admitted that he had arrived at a wrong conclusion, and since then negative pleas have been allowed.

Hall v. Noyes, 3 Bro. C. C. 187, 189;

Jones v. Davis, 16 Ves., 211.

Spangler v. Spangler, 19 Ill. App., 28;

" " Cas. Eq. Pl. & Pr., 139.

## ANOMALOUS PLEAS.

An anomalous plea is resorted to in those cases where the bill admits the existence of a certain fact, and then by distinct allegations seeks to avoid the legal effect of such fact, by setting up fraud or mistake. The anomalous plea avers the existence of



the fact admitted by the bill and then traverses the allegations of mistake or fraud contained in the bill through which the plaintiff seeks to avoid the legal effect of such fact. For example, suppose A and B had been co-partners and upon the dissolution of the co-partnership had submitted the differences between them, growing out of the partnership business, to arbitrators who had duly made an award. A afterwards files a bill against B praying for an account of the partnership business. Now, if he said nothing about the arbitration and award in his bill, B could by an affirmative plea set that up. But in such a case if the bill alleged that there had been an arbitration and a pretended award, but that such award was null and void because there has been collusion between the arbitrators and B, and set forth several alleged facts and circumstances which, if true, would tend to establish the collusion and fraud, in such a case B must resort to an anomalous plea, averring the arbitration and award, denying collusion and fraud by specifically denying each allegation of fact in the bill tending to establish such collusion and fraud. And this plea must be supported by an answer making a full disclosure in regard to all the allegations in the bill tending to show collusion and fraud. The complainant is entitled to have the allegations of fraud answered, because his right of action, as appears from his bill, depends upon his showing collusion and fraud. Otherwise, when he filed his replication to the plea, he would put in issue, not the existence of the facts showing fraud, upon which he depended solely for relief, but upon the facts appearing in the plea, that is the existence of the award, about which there is no dispute. But if the plea traverses the allegations of fraud, then a replication to the plea puts those allegations in issue. The defendant must traverse all the allegations tending to negative the plea, in the plea itself, and, as we have said, the plea must be accompanied by an answer in its support in which such allegations shall be fully and explicitly answered. The plea traverses the allegations in the bill tending to negative the plea, in order that the truth of those allegations may be put in issue. The plea must be supported by an answer as to those same allegations for a very different but equally satisfactory reason. The complainant is entitled to a full discovery from the defendant of all the facts within his knowledge or belief which tend to establish the complainant's right to relief or to discovery even. Therefore, when relief is based upon the ground of fraud and the defendant is asked to discover certain facts within his knowledge tending to establish such fraud, he must answer and make the discovery asked, to the end that the complainant may have the advantage of the answer as evidence upon the hearing of the plea to establish his case by disproving the case made by the plea.

We have already called your attention to the rule that if an answer covers any material part of the bill demurrer or pleaded to, the demurrer or plea will be overruled. In the case we have supposed where the bill is filed to set aside an award which, if good, would be a complete bar to the complainant's cause of action,



and the defendant pleads the award, it would seem at first glance that if the defendant answered the averments in the bill showing that such award was void, that the answer covered the same part of the bill as the plea. This is not the case, however. The bill in such a case is filed for the purpose of obtaining discovery and relief. The plea is to relief and not to discovery. The defendant relies upon the award as a complete bar to all relief. That it is a complete bar if valid, the bill in substance admits, for the complainant asks to be relieved from its effects by having it set aside. The defendant, therefore, by pleading the award and denying the allegations of fraud puts in issue the validity of the award. But the fact that there is a valid award and that therefore the complainant is not entitled to relief is not a denial that the complainant is entitled to a full discovery from the defendant of all the facts within his knowledge of belief, tending to disprove the plea. The answer, therefore, is not an answer to the bill, but simply an answer in support of the plea, since it makes discovery touching those averments in the bill traversed and denied by the plea and thus put in issue.

Bolton v. Gardner, 3 Paige. 273.

" " Cas. Eq. Pl. & Pr. 197.

Sanders v. King, 6 Mad., 61;

Thring v. Edgar, 2 S. & S., 2741277;

The answer is said to support the plea, for the reason that the court will intend all matters alleged in the bill, to which the complainant is entitled to require an answer, to be against the pleader, unless they are fully and clearly denied, and therefore, if in the case we suppose, the defendant should plead the award and not fully and clearly answer the allegations of fraud, the court would assume that such allegations were susceptible of proof and on that ground would overrule the plea. If there is a proper answer in support of the plea, such answer is no part of the defense, but only what the complainant is entitled to have to enable him to avail the defence made by the plea and establish the case made by the bill. The complainant is entitled to read the answer on the hearing of the plea.

Goodrich v. Pendleton, 3 Johns. Chy. 384.

" " Cas. Eq. Pl. & Pr., 203.

Hilyard v. Cressy, 3 Ark., 303.

Hony v. Hony, 1 S. S., 368, 369.

When an answer under oath is waived, the plea need not be supported by an answer, since the complainant is not entitled to discovery.

Cheatham v. Pearce, 89 Tenn., 368, 378;

Daniels Ch. Pr. (3 Am. Ed.) 640 n. 2.

Whenever notice of fraud is alleged in the bill the plea must be supported by positive averments negative the notice or frauds averred, and such notice or fraud must also be negatived by the answer which supports the plea.

Meadows v. The Dutchess of Kingston, Amb. 756;

Devie v. Chester, 1 Cox, 224;

Hoare v. Parker, 1 Bro. C. C., 578;

Bicknell v. Gough, 3 Atk., 558.





The answer in support of the plea must not go so far as to be an answer to the bill. The complainant is entitled to an answer to all interrogatories covering the allegations denied by the plea, and to no more. If other interrogatories are answered the answer will overrule the plea.

Sowzer v. DeMeyer, 2 Paige, 574.

" " Cas. Eq. Pl. & Pr., 211.

Grant v. Phoenix L. Ins. Co., 121 U. S., 105.

And when no answer in support of the plea is required any answer will overrule the plea.

#### DIFFERENT GROUNDS OF PLEA.

Pleas of relief are:

1. To the jurisdiction.
2. To the person of the complainant or defendant.
3. In bar of the suit.

1.

Pleas to the jurisdiction, do not deny the right of the complainant in the subject of the suit or assert that there is any disability on the part of either the complainant or defendant, but assert that a court of chancery is not the proper court to take cognizance of the cause.

Story Eq. Pl. § 706.

2.

Pleas to the person, do not dispute the jurisdiction of the court, or the interest of the complainant, but assert that the complainant is incapacitated to sue, or that the defendant is not the person who ought to be sued.

Story Eq. Pl. § 706.

A plea in bar alleges some matter which displaces the equity of the bill.

#### FORM OF PLEA.

A plea is entitled in the cause, and like a demurrer is introduced by a protestation against the confession of the truth of any matter contained in the bill.

The extent of the plea, that is whether it is intended to cover the whole bill, and if not the whole, what portion, should be distinctly shown.

Leacroft v. Darprey, 4 Paige, 124;

\*Summers v. Murray, 234 Ch., 205.

Then follows a clear and positive statement of the matter relied upon as an objection to the suit accompanied, when necessary, by such averments as are necessary to its support. When the objection is to the frame of the suit, it must point out the particular defect and how it may be remedied.

Merrewether v. Mellish, 13 Ves., 435, 438.

The general requisites of a plea have already been given. They are:

1. It must be founded on matter not apparent on the face of the bill.



2. It must reduce the case to a single point.

3. It must traverse all averments in the bill which tend to disprove the truth of the plea.

4. It must be supported by an answer if the bill calls for discovery touching any averment in the bill traversed and denied by the plea.

Dwight v. Ry. Co., 9 Fed. Rep., 735.

" " " Cas. Eq. Pl. & Pr., 213.

After the plea has been drawn, it must be signed by counsel and sworn to by the defendant, as true in point of fact.

Under the United States and Michigan practice no plea can be filed unless it is accompanied by a certificate of counsel that it is, in his opinion, well founded in point of law, and by the affidavit of the defendant that it is not interposed merely for the purpose of causing delay in the progress of the suit.

U. S. Rule 31 Mich. R. 8 a.

When the plea is filed the complainant must either set the cause down for hearing on the plea, or file a replication to the plea. If the plea is set down for hearing the truth of all the averments in the plea well pleaded is admitted, and the only question for the court to pass upon is the sufficiency of the plea.

Kellner v. Ins. Co., 43 Fed. Rep., 623;

Foster v. Foster, 31 Vt., 216;

Newton v. Tayer, 17 Pick., 120.

If a replication is filed to the plea, the complainant thereby admits the sufficiency of the plea in law, and the only question in issue is the truth of the matter pleaded.

Little v. Stephens, 32 Mich., 596;

Farley v. Kittson, 120 U. S. 303.

" " " Cas. Eq. Pl. & Pr., 183.

Wilson v. Wilson, 5 Ir. Eq., 314.

It becomes very important, therefore, for the complainant to determine in the first instance, whether the plea is good in law, because, if it should be bad in law, but the matters pleaded true in fact, and he should take issue upon the plea, by filing a replication the plea would be sustained, notwithstanding it was bad in form and the matters pleaded were no bar to complainant's bill, because, by filing the replication, the complainant admits that the matter as pleaded is a bar if true, and he denies merely the truth of the matters pleaded.

Bojarsus v. Trinity Church, 4 Paige, 173;

Harris v. Inglelew, 3 P. Sm., 94, 95.

If there is a plea to a part of the bill and an answer to the remainder, or a demurrer to a part and an answer to the remainder, the complainant must not except to the answer before the sufficiency of the plea or demurrer has been determined. Excepting to the answer is an admission that the demurrer or plea is sufficient. After the plea or demurrer has been overruled then the complainant can except to the answer.

Milf. Eq. Pl. 317;

Kupers v. Reformed Dutch Ch., 6 Paige, 570.



A demurrer must be good as to the whole bill or so much of it as is covered. It cannot be good in part and bad in part. But if the plea is not good for the whole of the part covered it may be good as to a portion of it and be allowed to stand for the part which it properly covers.

Dormer v. Fortescue, 2 Atk., 284;  
 French v. Shotwell, 5 Johns. Ch., 555.  
 Kirkpatrick v. White, 4 Wash. C. C. 595;  
 Fitzmaurice v. Sadler, 12 Ir. Eq., 136.

"A plea can be allowed in part only with respect to its extent--the quantity of the bill covered by it; and if any part of the defence made by the plea is bad, the whole amount must be overruled." Noe v. Noe, 32 N. J. Eq., 469;

Fitzmaurice v. Sadler, 12 Ir. Eq., 136, 151.

If the plea is set down for hearing and the court holds that it is good in form and in law, the complainant may then take issue upon it by filing a replication. After a replication is filed proofs are taken as to the truth of the plea and then a hearing is had upon that issue. The sufficiency of the plea is no longer an issue, the court is simply called upon to determine whether or not the defendant has by his proofs maintained the truth of his plea.

McEwen v. Broadhead, 3 Stockt. (N.J.) 129-131.

If the plea is allowed, it is thereby determined to be a full bar to so much of the bill as it covers.

Story Eq. Pl. § 697.

If the court should consider that although the plea may be good and the facts pleaded true from the proofs then before the court but that there may be matter disclosed in evidence which would avoid it, in order that the complainant may not be deprived of his rights, it will direct that the benefit of the plea shall be reserved to the defendant at the hearing.

Lord Redesdale, 245. Mich. R. 8.

The plea upon the argument may be ordered to stand as an answer to so much of the bill as is covered. And in such a case the answer is to be held sufficient unless the defendant is given leave to except it. It is only ordered to stand as an answer when it is in some way defective so that the truth of it is doubtful.

Orcutt v. Ounes, 3 Paige 459,

Beall v. Blake, 10 Ga., 458.

Michigan Ch. Rule 8. f., provides that if, upon issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him; if the facts are determined for the complainant the effect shall be the same as though the bill, or so much thereof as is covered by the plea, was taken ad confesso.

#### OVERHAULING PLEAS.

When a plea has been set down for argument and on the argument the court is satisfied that the plea cannot under any circumstances be made use of as a defence, it will be overruled.



And if it is a frivolous plea the complainant may, if he desires, have an order to take the bill as confessed.

Bowman v. Marshal, 9 Paige, 78;  
Mich. R. 8 d.

If the plea is not frivolous, the effect of overruling the plea is to impose upon the defendant the necessity of making a new defence. This he may do, by a new plea or by an answer.

Chadwick v. Broadwood, 3 Beav., 308, 316.

This rule giving the defendant a right to plead de novo does not permit him to rest his second plea upon the same ground as the first. And when a plea has been overruled upon the merits, the same matter cannot be set up in the answer as a defence without permission of the court.

Townsend v. Townsend, 2 Paige, 413;  
Piatt v. Oliver, 1 McLean, 295;  
Ringold v. Stone, 20 Ark., 526.

And if the defendant desires to plead de novo he should obtain leave of the court; for a defendant may not interpose more than one plea without special leave of the court.

McEwan v. Sanderson, L. R. 16 Eq., 316.

The effect of allowing or overruling a plea upon the argument, and the effect of finding a plea true or false upon the hearing, are widely different in their effects upon the rights of both the complainant and defendant.

If the plea is allowed upon the argument, the effect is to hold that the plea is good in law, assuming that it is true in fact, and the complainant is still at liberty to take issue upon the facts pleaded.

If the plea is overruled upon the argument, the defendant may put in a new defence, as we have just seen.

On the other hand, the decision of the court upon the hearing of the plea is decisive and final as to so much of the bill as is covered by the plea. If the plea is found true, the bill is dismissed, and if found false, the complainant is entitled to a decree; for the reason that when issue is taken upon the plea, after argument and allowance, its validity as a complete bar to the complainant's suit has been found by the court, and nothing further remains, except to ascertain whether or not the facts upon which its validity depends are true. If the truth is established, then the plea is found to be both true in fact as well as good in law.

But if the complainant takes issue upon the plea by filing a replication before the argument, and consequently, before the court has passed upon its sufficiency, by so doing he admits that the plea, if true in fact, is a bar to his suit, and this admission is conclusive so far as the sufficiency of the plea is concerned, it being precisely the same in effect as the allowance of the plea by the court. After the replication is filed, the only question in issue, as to so much of the bill as is covered by the plea is the truth of the plea. The complainant says by his pleadings in effect, if what the defendant has alleged in his plea is true, I am not entitled to any relief. While the defendant has, by his





pleadings, admitted that all the allegations made in the complainant's bill are true, except so far as they are denied by the plea, and that his sole and only defence to the complainant's suit are the matters which he has pleaded, and if those matters are not established, that he has no further or other defence, and that the complainant is entitled to a decree.

Story Eq. Pl. § 697;

U. S. Rule 33;

Hughes v. Blake, 6 Wheat., 453;

Mich. R. 8 f.

It follows that where the complainant files a replication to a plea, which is true in fact, but insufficient in law, that the bill must be dismissed upon the hearing, because upon the hearing the court will not examine into the sufficiency of the plea, because under the pleadings it is admitted to be good in law.

Harris v. Ingeldew, 3 P. Wm., 91, 94, 95;

Bogardus v. Trinity Church, 4 Paige, 178.

On the other hand, if the defendant has a complete defence to the complainant's suit, but rests his defence upon a plea of some matter which he cannot establish, he loses all the benefit of his defence upon the merits, and cannot prevent the complainant from obtaining a decree.

Hughes v. Blake, 6 Wheat., 453;

Mich. R. 8 f.

If the complainant, on the face of the bill, is entitled to a final decree, he may have such decree upon the plea being found false upon the hearing. If, however, he is not entitled to final and complete relief upon the case made, he is entitled to an order that the bill be taken as confessed, and for a reference to a master to take proofs. He may also, if necessary, examine the defendant upon interrogatories as to all matters which, by an answer, the defendant should have discovered.

Farley v. Kittson, 120 U. S., 303;

" " Cas. Eq. Pl. & Pr., 183-185.

\*\*\*\*\*



## CHAPTER XV

---oOo---

## THE ANSWER

From what has been said, you have learned that little or no advantage, except delay, is gained by demur or plea, except on bar, unless the cause for demur or the special defense made by the plea cannot be overcome or met by an amendment to the bill. Whenever the complaint can cure the defect for the doubt by these dilatory defenses ~~thru~~ through an amendment, the attack has had x no other effect save that of strengthening and fortifying the complainants position. When, however, the defect cannot be cured by amendment, those defenses should be resorted to, as they shorten litigation and save expense. And in case of want of parties, or a mis-joinder of parties or multifariousness, the benefit of the defense on that ground is frequently lost when not taken by demur or plea.

Turner V Hart, 71 Mich. 128 - 138

But since nearly every defense that can be made by demur or plea can be taken advantage of equally well by an answer, they are usually set up in the answer. This practice more regularly prevails at present than formerly, because since parties can be witnesses, avoiding discovery called for by the bill is now of little consequence, while formerly it was of the utmost importance.

## TWOFOOLD CHARACTER OF ANSWER.

The bill contains a statement of the complainant's cause of action and also an examination of the defendant as a witness in the cause; the answer must, therefore, consist of two parts:

- 1-The defense.
- 2-The discovery.

In the answer the defendant must set forth fully and clearly his defense to the complainant's cause of action, and he must also answer the complainant's interrogatory.

Wade V Rullisfer, 54 Vt. 45

Holt V Daniels, 61 Vt. 89, Cases Eq.Pl.Pr. 221

It is not necessary that the answer should be divided into two separate and distinct parts, the one being devoted exclusively to setting forth the defendant's defense and the other answering the complainant's interrogatories. The two may be



interlaced, but the pleader, in drawing the answer, should keep its twofold character in mind, and it should be so drawn as to set out clearly distinctly and fully, all the separate grounds of the defense, and it should at the same time, answer fully and explicitly, all matters in regard to which the complainant asks and is entitled to discover.

Warren V Warren, 30 Vt. 530

It is a general rule that the complainant cannot rely upon any grounds for release except those contained in the bill, and that the defendant cannot rely upon any ground of defense except that set up in his answer, and that all testimony introduced for the purpose of establishing some matter not claimed in the bill as a ground for release or in the answer as a ground for defense, is immaterial and irrelevant and will not be considered by the court.

Morse V Mors, 17 N.H. 481

Buckley V Sutton, 38 Mich. 1

Harvington V Brown, 56 Mich. 301

The defendant may set up in his answer any number of defenses that are consistent with each other or rather that are not inconsistent, but the defendant may not set up two or more grounds of defense which are inconsistent with each other, and the error will not be cured in such case by stating the ~~xxx~~ inconsistent grounds of defense in the alternative.

Hopper V Hopper 11 Paige 46

Jesus College V Gibbs, 1 Y. & C. Ex. 145, 160

Not the same degree of certainty is required in an answer as in a bill. There must be such a degree of certainty, however, as is sufficient to inform the complainant of the nature of the defendant's case.

Cummings V Coleman, 7 Rich. Eq. (S.C.) 509

The same strictness is not requisite in an answer as in a plea, where the statute of limitations is set up as a defense. This defense, if relied upon, must, however, be distinctly made, either by answer or plea, although the defense that the claim is stale may be made without any averment to that effect having been made in the answer.

Maury V Mason, 8 Porter (Ala.) 211

Sullivan V Portland, 94 U.S. 806

When matters of defense are set up in the answer which might have been taken advantage of by demur or plea, and the defendant, as to those matters, claims the same benefit in his answer as though he had demurred or plead, it is only at the hearing of the cause that any such benefit can be insisted upon.



Mulloy V Paul, 2 Tenn. C.W. 155  
Hume V Com-1 Ek. 1 Lea 229  
Zabel V Hartmann, 63 Mich. 273  
Holt V Daniels, 61 Vt. 89

#### FORM OF ANSWER

The answer must be entitled in the cause and agree with the bill as to the parties named therein. If a mistake in the name of the defendant has been made in the bill, such mistake cannot be corrected in the title, but the correction may be made in the body of this answer, thus, for instance: "The answer of Robert Sharp (in the bill by mistake called Roland Sharp)" etc.

Att'y Gen. V. Worcester, Coop. T. Cott. 18

If there is such a defect in the heading of the answer, that it does not appear distinctly whose answer it is, or in what cause it is filed, it will be taken off the files for irregularity.

Pritus V. Thompson, G. Coop. 249

Griffiths V Wood, 11 Des. 62

Fry V. Mampell, 4 Beav. 485

If, however, it is evident what bill is answered, it will not be stricken from the files although certain prescribed words have been omitted.

Bowes V Farrar, L.R. 14 Eq., 71

Two or more persons may join in the same answer, and when they appear by the same solicitor, and have the same defense, they ought to join, and the court will not, in case they should succeed in the suit, allow them any more costs, in case they file separate answers than would have been allowed if they had filed a joint answer.

Story Eq. Pl. Par. 869

Woods V Woods, 5 Hare 229- 230

The answer should be divided into paragraphs numbered consecutively and each paragraph should contain a full and distinct statement of some allegation. The present Michigan rule requires the answer to be divided into paragraphs. Documents not on file in the case cannot be referred to and made a part of the answer, but may be when so filed.

Wells V Stratton, 1 Tenn Chan. 328

Att'y Gen. V. Edmunds 15 W.R. 138

U.S.CC. Rule 4

Mich. R. 10 C.





When two defendants answer jointly and one speaks positively toward himself, the other may say that he has perused the answer, believes it to be true and that he make it a part of his answer. This he may not do however, if they answer separately.

Binneys Case, 2 Bland. 99

Warfield V Banks, 11 Guild. & J. 98

Carr V Wells, 3 C.E. Green (N.I.) 41

The answer must be signed by the defendant or the defendant's putting it in, unless leave has been obtained to file an answer not signed, the cause originally the answer was always under oath and was testimony in the cause.

Denison V Bassford, 7 Page 370

Cook V Does 2 Tenn Chan. 496

Kimball V Ward, Walker's Chan. 439

Littlejohn V Munn, 3 Page 280

Collard V. Smith, 2 Beasley ( N.I.) 43-45

Howes V Downing, 72 Mich. 43

Dumond V Magee, 2 Johns Chan. 240

Harding V Harding, 12 Ves. 159

Supervisors etc. V Miss. etc. R.R. , 21 Ill. 337

The Michigan practice permits the answer to be signed by the defendant, or by his agent or solicitor.

Mich. R. 10 e

The answer must also be signed by counsel. When such counsel are a firm, the firm's signature may be used.

Bishop V Willis, 5 Beav. 83 n

Hampton, V Coddington, 1 Stew. Eq. 557

Henry V Gregory, 29 Mich. 68

Eveland V Stephenson 45 Mich. 394

U.S. Chan. Rule 24

The copy of the answer served on a complainant is presumed to be a correct copy of the answer filed, and if the signature of the counsel is omitted from the copy served, the complainant may move to take the answer off the files for irregularity.

The signing of the answer by the defendant may be waived by the complainant, and if an unsigned answer is put in and the complainant files a repetition, that step on his part will be held to be such a waiver.

Fulton Bank V Beach 2 Page 307

The court, under special circumstances will permit the defendant to file an answer not signed by him, as when he resides at a distance, or has gone abroad before an answer could be prepared or the like.

Unless answer under oath is expressly waived in the bill the answer must be sworn to before the proper officer. Who is such proper officer depends upon the provisions of the local statute and the rules of the court.

Sitlington V. Brown, 7 Leigh (Va) 271

Mich. R. 10 b



The answer of a corporation is put in under the corporate seal and not under oath. If it is put in not under seal it will be taken from the files as irregular.

Ransom V Stonington Sav. Bk. 13 N.J.E. 21

Mill Dam Ed'y V Hovey, 20 Pick. 417

Bacher V Anderson, 45 Mich. 543

But unless the answer of the corporation is sworn to it cannot be made the basis of a motion to dissolve a temporary injunction; since an injunction will not be dissolved upon the filing of an answer not on oath denying the equities of the bill.

Fulton Bk. V. N.Y. etc. 1 Paige 311

Griffin V State Bk., 17 Ala. 258

When the complainant desires to obtain from the corporation the answer of some officer of the corporation under oath, such officer must be named and made one of the defendants in the bill.

Bufford V. Rucker, 4 JJ Marsh 551

Vermilyca V Fulton Bk. 1 Paige 37

Beacher V Anderson 45 Mich 543

When the complainant waives an answer on oath the answer is treated as a mere pleading and is not evidence for the defendant, but the plaintiff may take advantage of any omission made in it.

Bartlet V Gale, 4 Paige 504

Wilson V Tople, 36 N.H. 129

Durfee V. McClurg, 6 Mich. 223

When the bill waives an answer under oath the defendant cannot make his answer evidence by putting it in under oath. Under some circumstances the sworn answer will be considered as one not under oath.

Hyer V Little, 5 C.E. Green, 443

Symes V Strong, 1 Stew. Eq. 131

The Michigan rules provide that a sworn answer shall not have the force of evidence except as to admissions.

Mich. Chan. Rule 10 a

An unsworn answer cannot be made the foundation of a motion to dissolve an injunction; but, if an injunction bill waives an answer under oath, the defendant may still put an answer under oath and so treat it for the purpose of moving to dissolve the injunction granted on the bill.

Doughrey V Topping, 4 Paige 94

Mahony V Lazier, 16 Md. 69

Rainey V Rainey, 35 Ala. 282

When the answer is drawn, signed, and if necessary sworn to, it must be filed and a copy served upon the complainant within the time prescribed by the rules.

U.S. Rule 18. Mich. Rule 5



It is a general rule that if the defendant consents to answer he must answer fully. But it is an open question still, although it has been much discussed whether a defendant who answers a bill for an accounting; for instance, if the bill calls for a co-partnership accounting and the answer denies the co-partnership, he is still required to answer fully all the interrogatories touching the account.

French V Rainey, 2 Tenn. Chan. 640

Chan. Cooper, in French V Rainey, supra, reviews all the authorities on this question up to the date of his opinion.

It would seem that in such a case much is left to the discretion of the court. Discovery will not be required when it will be merely vexatious.

Lockett v Lockett, L.R. 4 Chan. 236

Story Eq. Pl. (10 ed.) Sec. 856 $\frac{1}{2}$  n2 t.

Beabow V Low L.R. 16 Chan. D. 93

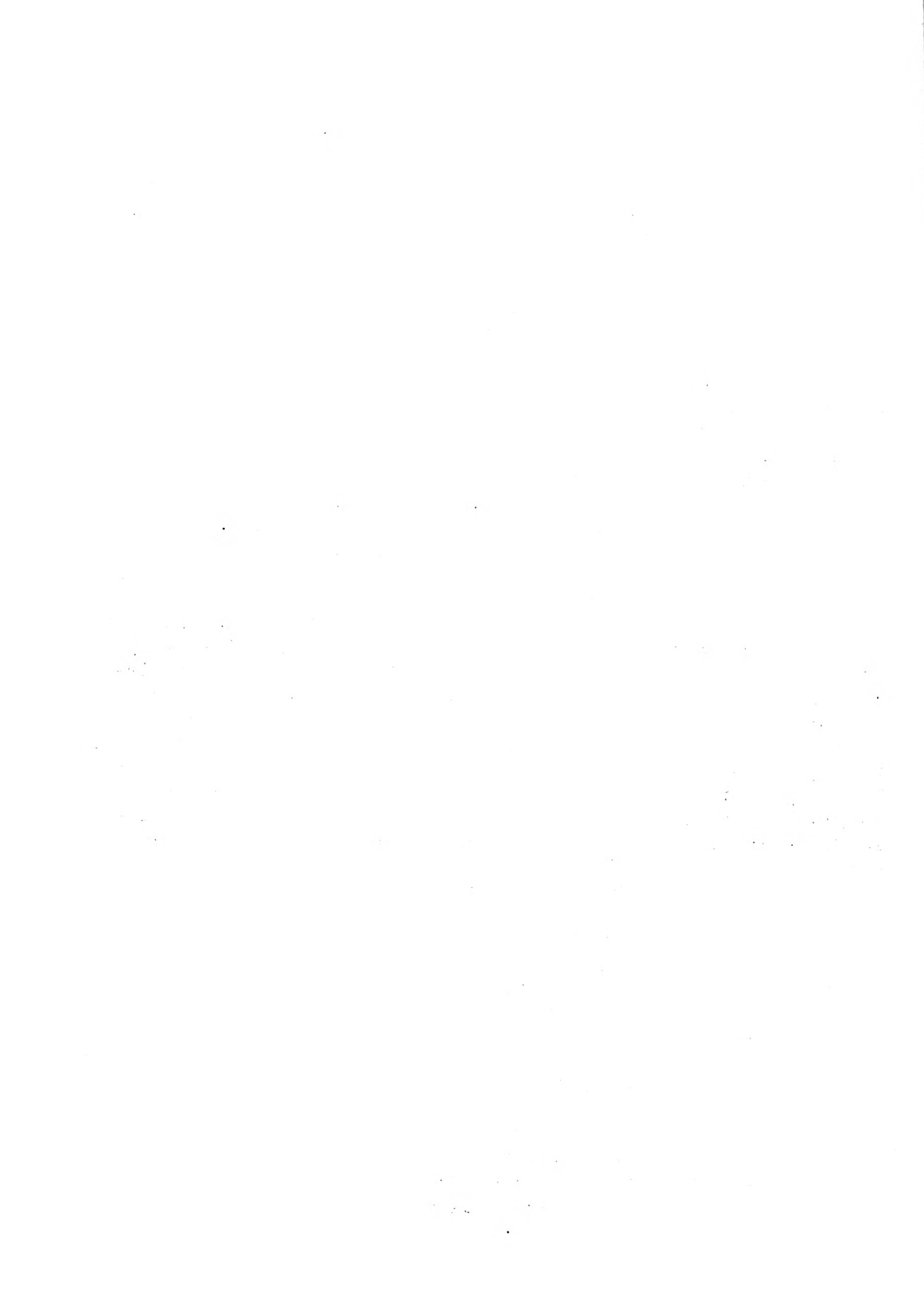
If an answer on oath has been waived in the bill the complainant cannot except to the answer filed as not having fully answered the allegations contained in the bill. In such a case the answer is a mere pleading, but he may still except to the answer for impertence or scandal if it is padded with irrelevant matter, or tainted with unnecessary comments or affecting the moral character of anyone. If an answer on oath has not been waived, and it does not contain a full disclosure of all matters in regard to which the defendant has been interrogated, it may be excepted to for insufficiency. The steps necessary for the complainant to take in excepting to the answer either for insufficiency, impertinence or scandal, are prescribed by the rules.

U.S. Rules 26, 27;

Brooks, V Byam, 1 Story 296

Stafford V Brown, 4 Paige, 88

The exceptions are entitled in the cause and they must point out positively and distinctly the matters in the answer which are objected to as impertinent or scandalous, or those parts of the bill which have not been fully answered. They pray that the scandalous and impertinent matter may be expunged, or that the defendant may put in a full answer. They are signed by the counsel, filed, and a copy served upon the opposing solicitor. The defendant may submit to make a further answer, to have the matter, objected to as impertinent or scandalous, expunged; if he does not, the answer and the exceptions are referred to the proper officer to examine and to report whether the exceptions are well taken.



Brooks V Ryan, 1 Story 296, Cases Eq. Pl. & Pr. 235  
 Stafford V. Brown, 4 Paige 88, Cases Eq. Pl. & Pr.  
 242

Under the Mich. practice you may not except to an answer for insufficiency.

McCreery V Circuit Judge, 93 Mich. 463

The defendant may claim in his answer the benefit of a general demur for want of equity. Courts are not, however, disposed to favor such mixed and unsatisfactory pleading, and they hold that in such a case the defendant may upon filing a replication take proofs and have the case heard upon the merits.

Lamb V Jeffrey, 41 Mich. 719

Hewlett, V Shaw, 9 Mich. 346

#### AMENDING ANSWERS.

When an answer has been put in on oath, the court will not permit it to be amended in matters of substance, except under very exceptional and special circumstances. Where the proposed amendment is to the form of the answer merely, or to correct some mistake of date, or a verbal inaccuracy, the court will not hesitate to grant leave to amend.

Bowen V. Cross, 4 Johns Chan. 375

Webster Loom co. V Higgins, 13 Blatchf. 349

Gainsborough V Gifford 2 P. Wms. 424

The court will also allow the defendant to amend his answer, where new matter has been discovered since the answer was put in.

Tillinghast V Champlin, 4 R.I. 128

Or to correct a mistake when owing to such mistake, an omission has been made to the prejudice of the defendant.

Hughes V Bloomer, 9 Paige 269

The court will not, however, permit amendments of this nature to be made merely on the ground that the defendant when he made the omissions, was laboring under a mistake of law, and when no mistake of fact has been made.

Rowlins V Powell, 1 P. Wms. 298

Pearce V Grove, Amb. 65

Pearce V. Grove, 3 atk. 522

Mich. Rules, 16 - 17

The strict rules of the common law are relaxed when the answer, whether under oath or not, is a mere pleading. The reason for such strict rules was found in the fact that the defendant by a proposed amendment sought to vary and alter his testimony.

Verplanck V Mercantile co., 1 Edw. Chan. 46; on cases Eq Pl. & Pr. 269; Thorne V Jumand, 4 Johns Chan. 363, Cases Eq. Pl. & Pr. 276





## CHAPTER XVI

---oOo---

## SUPPLEMENTAL ANSWERS.

It is the usual practice, at the present time, to file a supplemental answer instead of amending the original answer. Application must be made to the court for leave to file such supplemental answer, and the same rules govern such applications as those for leave to amend.

Brown V Ricketts, 2 Johns Chan. 425

" " Cases Eq. Pl. & Pr. 250

Arnand V Grigg, 2 Stew/ Eq. 1

Smith V Smith, 4 Paige 92

In making an application to file a supplemental answer, the defendant must show that justice requires that he should be permitted to make the correction in his answer or the additional defense. And the motion for leave to file the supplemental answer must be accompanied by an affidavit setting forth upon which the motion is founded.

Thomas V Doub, 1 Md. 252

McKim V Thompson, 1 Bland. 150

Wells V Wood 10 Ves. 401

When a defendant has obtained leave to file a supplemental answer, he must confine such answers strictly to the matters set forth in his application and in which he has received the leave of the court to embody in such answer. If he goes beyond that, his supplemental answer will be taken off the file.

Strange V Collins, 2 V. & B. 163 - 167

There is no particular time within which the defendant must make an application to file a supplemental answer, provided he make it as soon as the error or admission in his answer, or the newly discovered evidence has come to his knowledge. He must not be guilty of inexcusable laches, and furthermore it must be possible to place the complainant in the same position as he would have been in had the correction or new matter been stated in the original answer.

Martin V Anderson 5 Ga. 390

Ruggles V Eddy, 11 Blatch. 524

Fulton V Gilman, 8 Bv. 154 - 158

Mason V Hartford R.R., 10 Fed Rep. 334

" " Cases Eq. Pl. & Pr. 246



## TAKING ANSWERS OFF THE FILE.

As we have seen, an answer may be taken from the files if any irregularity has occurred in its frame or form. But the plaintiff must apply to have the answers taken from the files before he excepts to it, otherwise he will have waived the irregularity. It is a general rule in pleading that a positive step on the basis of some prior pleading is a waiver of any irregularity in such pleading.

Fulton Bk/ V Beach, 2 Paige 307

S.C. 6 Wend. 36

Seifried V Peoples Bk. 1 Saxt. 200

Not only may an answer be taken from the files for an irregularity in its form but if on its face it is evidently evasive the complainant may, before he excepts to its formal sufficiency, move to have it taken from the files.

Glassington V Thwaites, 2 Russ. 453 - 462

Seaton V Grant, L.R. 2 Chan App. 459

The court will also, sometimes, in case the pleadings, affidavits or other documents contain matters which, on account of its character, should not remain of record, although not scandalous because pertinent, permit them to be taken from the files upon the consent of all the parties to the suit.

Clifton V Bental, 9 Teav. 105

Walton V Broadbent, 3 Ware 334

Seaton V Grant, L.R. 2 Chan App. Cases 459

## JOINDER OF SEVERAL DEFENSES.

All or any two of the several modes of defense may be joined. A defendant may demur to part of the bill, plead to another part, answer to a third part and disclaim as to a fourth part. Each separate defense, however, may relate to a separate and distinct part of the bill.

Clark V Phelps, 6 Johns Chan 214

Livingston V Story 9 Pet. 632

A defendant, as we have seen, cannot plead to that part of the bill to which he has demurred, nor answer to any part to which he has demurred or plead, nor by answer claim that by disclaimer he has declared he has no right to; because a plea or answer, will overrule a demurrer and an answer a plea, the one defense being inconsistent with the other, the court preferring that which rests upon the merits.

Bolton V Gardner, 3 Paige 273

Spofford V Manning, 6 Paige 383



When a demurrer is to a part of the bill, and there is an answer or other defense to the remainder of the bill, it should be entitled: "The Demurrer of A.B. the above named defendant, to a part of the bill of complaint of the above named plaintiff, and the answer of the said A.B. to the remainder of said bill." When there is a plea to the part of a bill accompanied by an answer to the remainder, the plea and answer should be entitled as above, except that plea is inserted in place of demurrer.

Tomlinton V Swinerton, 1 Kenn. 9 - 13

When the answer, however, is in support of the plea, the title is "Plea and Answer."

These captions are not mere matters of form. If the answer by its commencement is apparently an answer to the whole bill, it will overrule a plea or demurrer to a part of the bill, although it does not answer that part covered by the demurrer or plea.

Leaycraft V Dempsey, 4 Paige 124

Summers V Murry, 2 Edw Chan. 205

If the answer contains a full and complete disclosure and there is no impertinent or scandalous matter in it to which the complainant desires to except, he must determine whether he will go to a hearing upon the bill and answer. If, assuming that all the material averments of the fact contained in the answer are true, the case made by the bill has been admitted, then he may notice the cause for hearing. In this case no allegation made in the bill, although put in under oath, will be considered as evidence in the cause, and all the material averments contained in the answer, although not put in under oath are held to be true. In short, the complainant must rely wholly on those allegations in the bill which the defendant has by his answer admitted and those admissions are to be taken with all the reservations and explanations contained in the answer. The allegations in the bill, admitted by the answer, must be sufficient, after being emasculated by the explanatory matters contained in the answer, to entitle the complainant to the relief prayed for, or he will fail in his suit. The case must be clear and strong, therefore, which will justify the complainant in going to a hearing on the bill and answer.

Contee V Dawson 2 Bland 264

Child V Horr, 1 Cole (Ia.) 432

Rogers V. Mitchell, 41 N.H. ,54

Pearce V West, 1 Peter=C.C. 351

Cummings v Corey, 58 Mich 494

Weigart V Frank, 56 Mich. 200

Durfee V McClurg 6 Mich 223.



If the answer contains any matter, not responsive to some interrogatories in the bill, but stated by way of defense, and no replication is filed, the truth of such new matter, if material and relevant is admitted.

Hazet V Pittsbury, 157 Penn. St. 548

Am. etc. co. V Chipman 140 Mass. 338

Davenport V Aud. Gen. 70 Mich. 192

There is an exception to the rule that the complainant can go to a hearing on the bill and answer when the admissions contained in the answer are sufficiently full and explicit. No decree can be taken on a bill confessed against an infant defendant, or on an answer of a guardian ad litem admitting the allegations contained in the bill, but the complainant must in either case sustain his bill by evidence.

Trayer V Lane, Walk. Chan. 200

Candler V McKinney 3 Mich. 216

Smith V Smith, 13 Mich. 258

Upon the hearing of a cause upon bill and answer no proof is introduced by either party, but if the answer refers to the matter of record proved by the record itself, or to exhibits, the record and exhibits are regarded as a part of the answer and may be read in evidence.

Roland V Sturgis, 2 Fairbairn 520

Chalk V Wine, 7 Fairbairn, 395

Legard V Sheffield, 2 Atk. 377

## REPLICATION

If the complainant cannot go to a hearing on the bill and answer he must join issue by filing a replication to the answer. According to the early system of the equity pleading, if the defendant set up in his answer some new matter, to which the complainant had a perfect defense, he set this up in replication, and if he wanted a discovery from the defendant in reference to such new matter, he was required to set forth the discovery which he desired. Under the modern system of pleading this purpose is accomplished by the complainant amending his bill and asserting such new matter, and requiring the defendant, if necessary, to file an amended answer.

If when the bill is joined the complainant is aware that the defendant will make a particular defense, he should meet such defense in the charging part of the bill and thus avoid the necessity of amending his bill.





The student must bear in mind that while the replication puts in issue the truth of all the averments made in the answer, that if such averments are true and the complainant has an answer thereto, which is a good defense, he cannot make that defense unless it is averred.

Upon the replication being filed, the cause is at issue, and the next step is for the complainant and defendant to take such proof as is necessary to sustain the contention on the part of each.

Mich. rule 12

But before any proofs are taken it is important that each party should determine how much of his case has been established by the pleading; what facts have been admitted, and what has been denied.

Admissions are either,

I-Upon the record, or,

II-By agreement between the parties.

#### I - ADMISSION UPON THE RECORD.

These may be,

1-Constructive; such statement of facts as the parties are conclusively presumed to have admitted under the forms of pleading, and,

2-Actual; such statement of facts as are actually set out in the pleadings.

We have seen that if the defendant puts in a plea to the bill, he thereby admits the truth of all matters well pleaded by the complainant, and not traversed by the plea. In such a case the facts set forth in the bill are constructively admitted to be true, and the complainant is not required, upon filing a replication to the plea, to introduce any proof to sustain his bill, except as to those matters specifically denied by the plea.

When the bill charges a fact to be within the knowledge of the defendant, or which from the whole context of the bill can be fairly presumed to be within his knowledge, and the answer is silent as to that fact, it will be taken as admitted.

McAllister V Clopton, 51 Miss. 257

But when the fact is not charged as within the knowledge of the defendant and cannot be presumed to be so, it is not admitted by the silence of the answer.

Hardy V Heard, 15 Ark. 184

Moore V Lockett, 2 Bibb. 67-69

Neil V Haggthorp, 3 Bland 551



In such a case if an answer under oath has not been waived and the plaintiff desires an answer to the charge contained in the bill he must except to the answer for insufficiency.

Any material matter, as a general rule, charge in the bill, and neither admitted or denied, must be proved by the complainant.

Brown v Pearce, 7 Wall. 205-211

Smith V St. Louis M.L. Co., 2 Tenn. Chan. 599-602

Hardwick V. Asst., 25 Mich. 149

If answer upon oath has been waived, all admissions made by the defendant in his answer may be read in evidence against him, without making the denials contained in the answer evidence in his favor.

Smith V Potter, 3 Wm. 432

The facts positively alleged in the bill may be read in evidence by the defendant as admissions made by the complainant. The complainant as a matter of course cannot read his own bill as evidence in his favor, unless the defendant, has, by his answer, admitted, directly or by implication, the truth of the bill, in which case the complainant may read such portion of his bill as the admissions of the defendant.

McGowan V Young, 2 Stew. 276

Although by his replication the complainant denies the truth of the whole of defendant's answer, he is not precluded from using any part of it as evidence in his favor, unless it be the answer of an infant. When the complainant reads a part of defendant's answer as an admission in his favor, he must read all of the answer bearing on that subject and any other writings referred to; he must take the admission with all the limitations and explanations with which it is accompanied. This rule applies to all admissions and to all testimonies.

Bartlett V Gillard, 3 Russ. 149

Beach V Haynes, 1 Tenn. Chan. 569-571

" " Cases Eq. Pl. & Pr. 229

Lady Ormond V Hutchinson, 13 Des. 47-53

It is not necessary that the defendant should in his answer make a positive admission in order to have it read in evidence against him; it will be sufficient if he alleges, that he believes, or is informed and believes it to be true; unless it is accompanied by some statement which prevents its being considered as an admission.

Potter V Potter, 1 Des. Sen. 274

Hills V McKinney, 3 Stew Eq. 435

Jackson V Olander, 2 W. & M. 465



When an answer under oath has not been waived and there is no rule to the contrary, so much of the answer as is responsive to the discovery sought by the bill may be read in evidence by the defendant. And where the allegations in the bill have been positively denied in the answer the complainant will not be entitled to a decree, based upon such allegations, unless they are supported by two witnesses, or by one witness with co-operating circumstances or documentary evidence alone.

Hart V Ten Eyck, 2 Johns Chan. 62-92

Panton V Telft, 22 Ill. 367

Gould v Gould 3 story 516 - 540

Under the present Michigan rules it will be remembered, an answer under oath never has the force of evidence except as to admissions.

Mich. rules 10 a

The right of the defendant to have his answer taken in evidence is co-extensive with his obligation to answer.

Balisdell V Bowers, 40 Vt. 126

And the complainant is not permitted to impeach the character of the defendant for truth and veracity. He has made him his witness.

Vandgrift, V Herbert, 3 C.E. Green 463-469

Chambers V Warren, 13 Ill. 313-321

When the answer is responsive to the bill it is evidence in the case and is conclusive upon the defendant and also upon the plaintiff unless he overcomes it with the counterevidence of two witnesses or testimony equivalent to that of two witnesses.

Comstock V Herron, 45 Fed. rep. 660

Bell V Farmers Nat'l Bk., 131 P. Ct. 318

Seitz V Mitchell, 94 U.S. 580

The answer under oath is not evidence which must be overcome by two witnesses in the following cases:

1-When it contains allegations, not responsive to anything in the bill upon which the defendant has been interrogated, but in opposition to or in avoidance of the plaintiff's case, such allegations are not evidence, they are matters of defense and must be established by the defendant. If material, the plaintiff may consider them as admissions made by the defendant.

Seitz V. Mitchell 94 U.S. 580

Roberts V Seligman, 78 Ill 120

Hart V Carpenter, 38 Mich. 402

It is not always easy to determine whether a particular allegation in the defendant's answer is new matter, or is matter



responsive to the bill. It has been said, that if the particular allegation can be omitted from the answer, and the complainant's interrogatories will still be fully answered, it is new matter, but if, when stricken out, the answers could be excepted to for any insufficiency, that it is responsive.

Bellows V Stone, 18 N.H. 465

2-When the matters contained in the answers do not contradict the allegations of the bill and make them improbable, or if the matters contained in the answer are absurd and contradictory - in either case they are not evidence.

Stephens V Post, 12 N.J.E. 403

Adams V Adams, 21 Wall. 185

3-If the answer is not positive and direct in its denials or explanations it is not evidence.

Morse V Hill, 136 Mass. 60

Lyon V Hunt, 11 Ala. 296

4-When the matter is stated upon information and belief, it is not evidence.

Pierson V Ryson, 5 N.J.E. 196

Towne V Neham, 3 Paige 545,

5-If the matter is stated positively, and from the situation of the parties and the circumstances, it is apparent that the facts are not within the personal knowledge of the defendant, it has no greater weight than it would have, if stated to be on information and belief.

Lawrence V Lawrence 21 N.J.E. 317

Fryrear V Lawrence 5 Gillman 325

6-If the answer is discredited in part it has the same effect as when the testimony of a witness is shown to be false in part.

Forsyth V Clark, 3 Wendell 637

Young V Hopkins, 6 T.B. Mon. 18

And while the complainant may not impeach the defendant because he is his own witness, he may show that he has made admissions which are inconsistent with his answer. We may contradict him.

Brown V Bulkley, 14 N.J.E. 294

Petty V Taylor, 5 Dana 598

Millet V Robins, 12 Wis. 319

7-When matters are presumably within the knowledge of the defendant, and are in the bill charged to be within his knowledge, and the answer professes ignorance, the allegation of the bill as a rule, are held to be admitted.

Mad V Day, 54 Miss. 58

Earlow V Quarrier, 16 W.Va. 106





If, however, a mere allegation in the bill is either admitted or denied in the answer, it must be proved by the complainant.

Glos V Randolph, 13 Ill. 197

8-A denial of a legal conclusion is not as a matter of course evidence of the law.

Gainer V Russ, 20 Fla. 157

It is said that the answer must be overcome by testimony equivalent to two witnesses. This does not mean that the defendant's testimony has the same weight as that of two witnesses. The complainant must establish the essential allegations made in his bill. The burden of proof is upon him. If he calls for an answer under oath and thus makes the defendant his own witness and his testimony is adverse he must not neutralize such testimony and then establish his bill by additional evidence. It requires one witness to put the complainant in the position he occupies before the defendant's answer and another to prove the truth of his bill.

Morrison V Stuart, 24 Ill. 24

Veile V Hopp, 104 U.S. 441

Veile V Bodgett, 49 Vt. 270

## II-ADMISSIONS BY AGREEMENT.

These are admissions made by the parties to prevent delay and save expense. It is the practice in this state, and undoubtedly in other states, to put such admissions in the form of a written stipulation. Such stipulation is entitled in the cause, and usually proceeds as follows:

### TITLE

In this cause it is hereby stipulated by and between said parties;

1st, that, &c.

2nd, that, &c.

Finally, that the facts hereby and herein set forth shall be considered by the court upon the hearing of said cause as admissions made therein by said parties, and may be read as evidence upon the hearing of said cause.

The stipulation is signed by the solicitors for complainant and defendant and is filed with the other proof.

--o--o--o--o--o--o--o--o--



## CHAPTER XVII

---oOo---

## TAKING TESTIMONY

Formerly all testimony in Chancery was taken upon interrogatories before an examiner, and neither party to the suit was permitted to be present in person or by counsel. Nor was either party entitled to a copy of the interrogatories prepared by the other for his witnesses. As we have seen, the bill did not set forth the evidence tending to establish the case made by the bill, but merely the facts which such evidence would tend to establish when introduced. Each party drew up the interrogatories for his own witnesses and the witnesses were secretly examined by the examiner and no part of the testimony was divulged to either side. Each party was however, entitled to be furnished with a list of his opponent's witnesses that he might examine them upon cross-interrogatories, if he desired, but since he neither knew what the direct interrogatories were, nor how they had been answered, such cross examination was not only unsatisfactory, but quite likely to do his cause more harm than good. Full directions were given as to how the examiners were to proceed. The witness was not permitted to see the interrogatories he was to answer; each one was read over to him and he was required to answer it in full before the next was read. After the testimony was taken it was filed in court and then published, i.e., open for inspection, and each side was furnished with copies, and thus after the cause was ready for hearing, the counsel for the first time learned what evidence had been introduced.

Daniel's Chan. Pr. Chap.20

This system was cumbrous, unsatisfactory, often unfair and fell into merited disrepute. The rules for taking proof were from time to time modified, until at the present time, testimony is taken with the same publicity and with little more formality than proofs are taken in a law court. In this state, under the statute either party may have, by giving the other notice within ten days after a cause is at issue, all the witnesses examine in open court.

Mich. Sec. 10133

The supreme court is empowered by the statute to regulate the taking of testimony in Chancery, and in pursuance of such powers, it has adopted certain rules which provide how, when a cause is at issue, if neither party has obtained the right of examination of witnesses in open court, the testimony shall be taken.

Mich. rule 14



Brown V Brown, 22 Mich. 242

Parties may stipulate to take proofs before a Notary Public, and this is frequently done when there is a Notary who is a stenographer and the circuit court commissioner is not. But in the absence of a stipulation the proofs are taken before a circuit court commissioner at the time and place designated, the party appears with his witnesses and proceeds to examine them orally. If the opposite party is present and does not object, the testimony may be taken in a narrative form omitting the questions asked, but if objection is made to that course, the circuit court commissioner writes down each interrogatory at length, followed by the answer as given by the witness. Should the opposite attorney object to any question for any reason, for instance, that it is leading, or irrelevant, the commissioner writes down the objection but does not pass upon it. After he has taken down the objection he writes out the answer of the witness in the language of the witness. If objection is made, the court regards such testimony as taken subject to the objection, which is considered and ruled upon at the hearing. Although the commissioner cannot pass upon objections made to testimony, it would seem that he may exercise some discretion in the first instance in regard to taking down scandalous matter, or testimony that the witness is privileged from giving.

Storrs V Scougale, 43 Mich. 383

Rea V Rea, 53 Mich. 40

In nearly every instance, however, it is the better practice for the commissioner to take down all the testimony offered, together with the objections made to it, and leave the admissibility of the testimony to the circuit and supreme court. The supreme court have held that it is not the proper practice, for the circuit even, to expunge testimonies that in its judgment is inadmissible, but to allow it to stand, so that in case of an appeal to the supreme court, that court may be in the position to consider and pass upon its admissibility. The supreme court sitting in Chancery, is not a court of errors, but an appellate court, and it hears the cause de novo, and must therefore pass upon all questions of the admissibility which were before the lower court.

Bilz V Bilz, 37 Mich. 116

Brown V Brown, 22 Mich. 242

Collins V Jackson, 53 Mich. 40

Hulett V Shaw, 9 Mich. 346



If any documents are introduced in evidence before the commissioner, he receives them and marks them as exhibits, numbering them consecutively. When the time has expired for taking proofs, the commissioner files the testimony taken by him in the cause; thus it is published.

Mich. rule 14

The statute provides that the counsel of the respective parties may be present at such examination, and that the witnesses may be examined and cross-examined orally, and that the testimony so taken shall be reduced to writing and subscribed by the witnesses, and filed in the court where the cause is pending.

U.S. Par's 6639 - 6646

When a deed or other instrument in writing which is duly acknowledged or proved, in such manner as to authorize it to be read in evidence, is stated in the bill, such deed or instrument, may be read upon the hearing of the cause, unless the defendant has in his answer denied the due execution of the deed, or the existence of the instrument; but documents which are not of themselves evidence, without further proof, shall not be read on the hearing unless they have been made exhibits before the commission.

Mich. rule 56

Batchelor V Nelson, Walk. Chan. 449

Jerome V Seymour Har. Chan. 255

Sweetland V Sweetland, 3 Mich. 482

The method of taking testimony in the U.S. Court is regulated by rules 67, 68, and 69, which provide that the testimony of witnesses may be taken upon direct and cross interrogatories or orally, before an examiner. When it is taken orally, the court may, on motion of either party, assign a time within which the complainant shall take his evidence, and the time thereafter within which the defendant shall take his. The rules prescribe that the testimony in a cause shall be taken within three months after the cause is at issue, unless further time is given by the judge, or court, upon cause shown.

When a witness is infirm or about to depart out of the country, or is the sole witness to a material fact, his testimony may be taken at any time after the bill is filed de bene esse, upon leave granted.

U.S. rule 70





## HEARING OF THE CAUSE.

When the proofs are closed and the cause is ready for hearing, it may be noticed for hearing by either party, and causes are entitled to be heard in this state in the order in which the replication to the answer was filed.

Mich. rule 14

Upon the hearing the complainant has the opening and closing. As a rule, the judge, before the hearing on the merits commences, has the counsel for the complainant state in his own language, the purpose for which the bill was filed, and its principal allegations of fact, and he then requests the defendant to state the defense made in the answer. Having thus made himself familiar with the matters in issue, he next proceeds to ascertain what facts are admitted, and about which there is no controversy, and what facts are in dispute. If only a part of the facts of the case are in dispute, he can find the reading of the testimony bearing upon these questions.

In reading the testimony to the court, the complainant reads the direct testimony given by his own witnesses, and the defendant reads the cross-examination. When the defendant's testimony is reached, the defendant's counsel reads the direct and the complainant's cross examination. At the close of the hearing the court may decide the case, or hold it under advisement, and render his decision at some future date. Causes are frequently heard out of turn, and at chambers by arrangement made between the court and counsel. In such a case the cause is formerly submitted to the court in term, and the argument made afterwards before the court. In this manner it appears upon the record that all the proceedings were had in court, and all appearances of irregularity are avoided.

If there is any good reason on account of the nature of the testimony, a cause will be heard in private, and the public will be excluded. The court may direct that the cause shall be heard in private at the request of counsel, or on its own motion.

Matter of Lord Portsmouth, Cooper, Rep. 106

Ogle V Brondling, 2 Russ. & My. 688

An objection to the bill based on want of proper parties may be made at the hearing, but if the defect can be cured by amendment and service be had upon the new parties, the court will, upon terms, allow the cause to stand over that the proper parties may be added.

Jones V Jones, 3 Atk. 110

Palmer V Rich, 12 Mich. 414



The objection, however, must come from the defendant, as the complainant cannot postpone the cause without his consent, unless the complainant was ignorant of the persons whose claim will be affected by the decree.

Inness V Jackson, 16 Ves. 356

Thomas V Gaines, 35 Mich 155 - 165

If the objection of want of parties has been made by the defendant in his answer and the complainant has neglected to amend his bill in that particular, the court may in its discretion refuse to allow the bill to stand over and dismiss the bill.

Van Epps V Dan Deusen, 4 Paige 64

Bank V Seaton, 1 Peters 229

Story V Livingston, 13 Peters, 359

U.S. rule 52

When upon the hearing it is discovered that the proofs are defective in some formal matter, the court will, if a reasonable excuse is given for the omission allow the cause to stand over for the purpose of supplying such defects.

1 Barb Chan. Pr. 322- 32 3

U.S. rule 53

#### DISMISSING THE BILL AT THE HEARING.

When pleadings are defective, or when through some informality in the bill the court cannot give the complainant relief, or where from some other cause the bill is dismissed without the court's passing upon the merits, and it appears that the complainant may be entitled to some relief, it will be dismissed without prejudice.

Story Eq. Pl. Par 456-793

Wilson V Egleston, 27 Mich. 257

But if a bill is dismissed by the court upon the hearing absolutely, such dismissal may be pleaded in bar to a new bill filed for the same cause of action; And a bill cannot be dismissed without prejudice when a new bill must cover the same ground.

Crozier V Acre, 7 Paige 137

Gale V Gould, 40 Mich. 515

A bill is sometimes dismissed and the complainant given leave to bring an action at law. The court may make an order retaining the bill for a certain period with liberty to the complainant to proceed at law, conditioned, that if he fails



to do so, that the bill be dismissed absolutely.

1 Barb. Chan. Pr. 324, 325

In this state the court may at the hearing upon pleadings and proofs call upon either party and any witness to testify before the court orally.

Mich. rule 15

Hamilton v Hamilton 37 Mich. 302

#### FEIGNED ISSUES.

It sometimes happens that the testimony is so conflicting and unsatisfactory, that the court or the parties may desire that a particular question of fact be found by a jury. An issue made for that purpose is called a feigned issue.

3 Black. cases 452

The court approves the frame of the issue and it is tried substantially as a suit at law.

3 Barb. Chan. Pr. 484

Milk V Morse, 39 Ill. 584-588

Russell V Paine, 45 Ill. 350

Wood V Wood, 2 Paige, 109

Dunn V Dunn, 11 Mich. 235

Brink V. Morton, 2 Cole (Ia.) 411

Hall V Doren, 6 Cole (Ia) 433

--0--0--0--0--0--0--0--0--



## C H A P T E R XVIII

---oOo---

## DECREES

A decree is a sentence of a court of chancery determining the rights of the parties to the suit.

Decrees are of two kinds, Interlocutory and final.

## INTERLOCUTORY DECREES.

An interlocutory decree is a decree made during the pendency of the cause to facilitate the taking of proofs, or to protect the rights of the parties, or to aid the court in arriving at a correct conclusion in regard to some disputed fact, but such decree must not be a final determination of the rights of the parties in whole or in part.

## FINAL DECREES.

A final decree is one that disposes of the whole or some part of the case on the merits and reserves no question for the further judgment of the court thereon.

Crosby V Buchanan, 23 Wall., 420

Lewis V Campau, 14 Mich. 458-460

Winthrop V Meeker, 109 U.S. 180

Cases Eq. Pl. & Pr. 258

It is sometimes exceedingly difficult to determine whether a particular decree is an interlocutory, or, a final decree. The distinction is an important one, since the right to appeal from a decree is a statutory right and must be strictly followed, and the statute usually restricts the right of appeal to final decrees. It may be said that any decree which finally disposes of the rights of the parties upon the merits of any branch of the controversy is final, but that if the merits are not passed upon and the order is made simply to take an additional step towards a final determination upon the merits, it is interlocutory, provided the rights of the parties remain in statu quo, for any decree which divests a party of a pre-existing legal right is final.





Barry V Brings, 22 Mich. 201  
Tawas etc., R.R. V. Losco Ct. 44 Mich. 489  
Jennison Ch. Pr. Chap. 18  
Bank V Whitney, 121 U.S. 284  
Cases Eq. Pl. & Pr. 257

### SETTLING DECREES.

The party in whose favor the judgment of the court is made makes a draft of such a decree as he deems he is entitled to under the decision. He serves upon the opposite solicitor a copy of this draft, with notice of the time and place he will apply to the court to have it set led. If the draft is satisfactory to the solicitor upon whom service is made, he usually indicates, by endorsement on the draft, his consent to have the decree settled in that form. If it is not satisfactory he may propose amendments and appear before the court, and after the parties are heard, the court settles and signs the decree. The decree is then countersigned by the register and entered in the journal at length.

The decree should in apt terms set forth clearly and methodically the judgment of the court. If the defendant is required to do, or to refrain from doing, some act, it should be distinctly set forth, and if the defendant is required to perform some act the time within which it is to be performed and the manner of performance should be made plain.

### FORM OF DECREE

The formal parts of a decree are:

- 1-Date and title,
- 2-Recitals,
- 3-Ordering part; and to this is sometimes added,
- 4-Declaratory part.

At first the decree on its face set forth the pleadings and the evidence, but usually, at the present time, the decree recites merely the substance of the pleadings and the facts upon which it is founded, and in the United States Court not even that is done. Rule 86 provides that no part of the bill, answer or other pleadings or report of the master, or other prior proceedings shall be recited in a decree.

U.S. Rule 86

Dexter V Arnold, 5 Mason, 303, 311

Bartlett V Fifield, 45 N.H. 82-83

It is still the practice in some of the states, however, to set forth the evidence in substance in the decree.



Walker V Carey, 53 Ill. 470  
Moss. V. McCall, 75 Ill. 190  
Hilleary V Thompson, 11 W.Va. 113  
Allen V Blunt, 1 Blatch. C.C. 480

In the mandatory part of the decree great care should be taken to meet the case disclosed and secure the rights of each of the parties. The decree must be consistent with itself. But the court may without contradiction pass a separate, a reciprocal, a direct or an inverted decree to meet the nature of the case.

Lingon V Henderson, 1 Bland. 275  
Hodges V Milliken, 1 Bland. 507  
Owens V. Case, 1 Bland. 404  
Elliott V Pell, 1 Paige, 263

#### RECTIFYING DECREES.

When a mistake or clerical error has been made in a decree, it may be corrected by the court upon motion or petition, made after entry and before enrollment.

Bates V Garrison, Har. Ch. 221  
U.S. Rules 85  
Giant Powder Co. V Cal. Powder Co., 57 Fed.  
Rep. 197.

same case - Cases Eq. Pl. & Pr. 262

The party making application to have a decree corrected must show that he has been injured by the error or mistake.

Russell V Waite, Walk. Ch. 31  
Insurance Co. V Whittmore/ 12 Mich. 427  
York V Ingham Ct. Judge, 57 Mich. 421  
Hart V Lindsay, Walk. Ch. 72

#### ENROLLMENT OF DECREES

At common law a decree did not become a final record of the court until it was enrolled. It must be enrolled before a deed can be executed on a sale under a decree and before an execution can issue to enforce performance.

Minthorne V. Thomas, 2 Paige (202 ) 102  
Taylor V Gladwin, 40 Mich. 233  
Mickle V Maxford, 42 Mich. 304  
Law V Mills, 61 Mich. 35  
Long V Long, 59 Mich. 296



The decree is enrolled in the following manner:

The register of the court in which the decree is entered, attaches together the bill, pleadings and such other papers as the general rules direct, together with the taxed bill of costs therein, and annexes thereto a fair engrossed copy of the decretal order, signed by the circuit judge and countersigned by the register who entered the same. The register then annexes to the papers so attached together his certificate, under the seal of the court, wherein he certifies according to the fact, the time when the papers were attached together, for the purpose of enrollment and the names of the parties at whose instance the same was done.

Schwab V Mabley, 47 Mich. 512  
Long V Long, 59 Mich. 296  
Loud V Winchester 52 Mich. 174  
Low V Mills, 61 Mich. 35  
Mickle V Maxfield, 42 Mich. 304  
Mich. R. 24

The decree is not enrolled by the register on his own motion. He must be requested by one of the solicitors to enroll the decree and this request is made in writing and is attached to the decree with the other records at the time it is enrolled.

Mich. Ch. R. 24

Miller Statutes Par's. 463 - 464

When a decree is enrolled that particular suit has been finally disposed of, ended, and cannot be disturbed upon motion or petition. It can only be opened when a bill of review filed upon leave granted, and the power of the court to grant leave is discretionary.

Maynard V Pereault, 30 Mich. 106  
Vaughn V. Black, 63 Mich. 215  
Clark V Cir. Judge. 40 Mich. 166  
Dexter V. Arnold,, 5 Mason 303  
Same case, Cases Eq. Pl. & Pr. 277  
Hill v Philips, 101 Fed. Rep. 650  
Ditto, Cases Eq. Pl. & Pr. 297

#### WHO ARE BOUND BY THE DECREE.

As a general rule, all who are parties or privies to a decree are bound by it, and no one who is not a party, or is not represented by or in privy with a party to the suit is bound.



Brown V Wynkoop, 2 Blackf. 230  
com. V Cambridge, 4 Mass. 627  
Mallow V Hinde, 12 Wheat. 193  
Richter V Jerome, 123 U.S. 233  
Atkinson V Flanigan, 70 Mich. 639  
German seminary V Saenger, 66 Mich. 249

#### ENFORCEMENT OF DECREES.

It is one of the maxims of equity that it acts in personam. "The strictest primary decree is this court," said Lord Chancellor Hardwicke, "is in personam, and although this court cannot issue execution in rem, e.g. by elegit, still I can enforce the judgment of the court, which is in personam by process in personam, e.g., by attachment of the person when the person is within the jurisdiction, and also by sequestration, so far as there are goods and lands of the defendant within the jurisdiction of the court, until the defendant do comply with the order or judgment of the court, which is against the defendant personally, to do or cause to be done, or to abstain from doing some act."

Penn. V Lord Baltimore, 1 Ves. 385

Therefore unless the power of the court has been enlarged by the statute, the performance of an order or a decree of the court is enforced by what is termed process for contempt. The process is based upon the theory that the defendant having having been commanded to do, or to refrain from doing a particular act, is, by his neglect to do, or by doing that particular act, in contempt of the court, and for such contempt has merited punishment. The law courts act upon an entirely different theory. They do not regard the defendant, who fails to satisfy a judgment rendered against him, as a contempt of the court, but issue process to satisfy the plaintiff's demand, when it may be satisfied, by seizure and sale of the defendant's property, or the imprisonment of the body of the defendant.

Contempt of the court in equity is technically disregarding the command of the court evidenced and authenticated by its great seal, and consequently before a party can be said to have incurred such contempt, he must be personally served with the mandate of the court under seal, and the mere service of a copy of the decree, or order of the court, without the writ is not sufficient.





## WRIT OF EXECUTION.

The writ is called a writ of execution, and it recites the order or decree, or that part of it which the defendant is to obey. At first it was the practice to insert the entire decree, but afterwards, by order of the court, if the decree was for the payment of money the substance of that part directing the payment of money was inserted.

When the order or decree directs the defendant to do a particular act, which he neglects to do, the writ of execution commands him to do the act within a specified time, and if it is not done within the time limited, the party is then in contempt.

Generally the writ of execution must be served upon the party himself in order to bring him into contempt.

This is done by handing him a copy and showing him the original under the seal of the court. But when personal service cannot be had upon a party owing to his misconduct, substituted service will be directed. A party will not be permitted to put the court at defiance.

Tyson V Ward, 1 Dickens, 166

Ryder V Kidder, 12 Ves. 202

Ditto - Cases Eq. Pl. & Pr. 267

DeManneville V DeManneville, 12 Ves. 203

## WRIT OF ATTACHMENT

The party having been duly served with a writ of execution, if he neglect to obey the mandate, and that fact is brought to the attention of the court by affidavit, a writ of attachment is issued, upon which the party is arrested and brought before the court, unless he can purge himself of the contempt, he is by order of the court directed to comply with the mandate instant or stand committed to jail.

2 Dan'l Ch. Pr. Sec. 7

The statute has, however, very materially enlarged the powers of the court, and in this state courts of equity may enforce the performance of any decree or obedience thereto, by execution against the body of the party, against whom such decree shall have been made, or by execution against the goods and chattels, and in default thereof, the lands and tenements of such party.

H.S. Par 6653

Mickle V Maxfield, 42 Mich. 304



## INTERLOCUTORY PROCEEDINGS

The proceedings we have already noticed are the usual and regular proceedings had in every cause in chancery. There are certain interlocutory proceedings to which we will now call your attention, none of which may be had in a given cause, but some of which are usually taken at some stage in the progress of every cause, and which are of great practical importance.

An interlocutory application is a request made to the court for its aid and assistance in some matter arising in the cause, either to further the proceedings or to protect the rights of some of the parties to the suit. These applications are made either orally, when they are called motions, or in writing, when they are called designated petitions.

There is no inflexible and certain rule given by which you can determine whether a particular application shall be made by motion or by petition. As a general rule, when the application is based upon a long or intricate statement of facts, it should be made by petition and not by motion. Otherwise the application may be made by motion.

Shipbrooke V Hinchbrook, 13 Ves. 387 - 393

Shaft V Phoenix Ins. Co. 67 N.Y. 544 - 547

Bergan V Jones, 4 Met. 371

Jones V. Roberts, 12 Sim. 189

Anon V Madd. 229

Skinner V Sweet, Coop., 55

A motion may be made by or on behalf of any of the parties to the suit, who is not in contempt. If a party is in contempt, he cannot be heard until he purges himself of his contempt.

Johnson V Pinney, Paige 646

Rogers V Patterson, 4 Paige, 450

Lane V Ellzeg, 4 H. & M. 504

## A MOTION IS EITHER OF COURSE OR SPECIAL.

A motion of course is one which will be granted upon an ex parte application and without hearing the other side, under some standing rule or the known practice of the court. It requires no notice to be given the opposite party as no opposition will be allowed to it.

Eyles V Ward, Mos. 255

Barbour Ch. Pr. 566



Motions of course are understood to be confined to orders which are entered by the register, at the request of the party, without any application being made to the court.

Mich. Rule 15

U.S. Rule 5

Since the motion is made orally to the court, the only evidence that such application was made is found in the recital of the order made by the court, that "upon motion of A.B. solicitor etc.,"

#### SPECIAL MOTIONS.

A special motion is one which is not granted by the court as a matter of course, but one which the court may, in its discretion, after cause shown, grant or refuse. They are made either ex parte or upon notice.

There is no clear and well defined rule under which special motions may be classified into those which may be made ex parte or upon notice. You must in a great measure rely upon the rules of the court which state usually whether the special motion requires notice or not. If the rules are silent, and the practice is uncertain, the safest course is to give notice.

Marshall V Mellinsh, 5 Beav. 496

Ishard V Cazeaux, 1 Paige 39

Hart V Small 4 Paige, 551

U.S. Rules 3 - 4

Mich. Rule 15

Ex parte motions are made for a variety of purposes -- for instance:

For an order that an absent defendant appear; that complainant's bill be taken as confessed; to show cause why injunction should not issue; to enlarge the time for taking testimony; for time to answer; for appointment of a guardian ad litem etc.

Sometimes upon an ex parte motion an order is entered that a particular act is to be done unless the opposite party show cause to the contrary within a specified time. Such an order is called an order nisi. After the time limited for showing cause, or doing the act required, the order nisi is made absolute.

Dan. Ch. Pra. 1594

All motions must be supported by affidavit or other proof sufficient to make a case for the interference of the court.

When the motion is not of course and cannot be made ex parte, notice must be given in writing to the opposite party.



This being simply a notice that an oral motion will be made to the court, the form of the notice becomes important. It must be entitled in the court and cause and directed to the solicitor of the opposite party and signed by the party giving notice. In the body of the notice the particular order or direction of the court which will be asked for must be set out clearly and distinctly, and the party must be informed of the grounds upon which the application is made, and consequently notice must be accompanied with copies of all affidavits and other proofs not on file in the cause, and previously known to the other solicitor, which will be read upon the hearing of the motion. The time and place of hearing must be given also. This part of the notice usually concludes with the words, "or as soon thereafter as counsel can be heard."

Isnard V Cazeaux, 1 Paige 39

Brown V Ricketts, 2 Johns Ch. 425

Jackson V. Stiles, 1 Cow. 134, 135 n

The time and manner of service is fixed by the rules.

After the notice has been served the party making the service should prepare ~~an~~ an affidavit setting forth the time and manner of service to be used in case the opposite party ~~does~~ not appear to oppose the action.

It is the practice of the court when several motions are to be made, to first hear ex parte motions and those which are not opposed. When a motion is opposed it is the usual practice for the party making the motion, to first read the notice and the affidavits, if any, in its support, and then for the opposing

party to read any opposing affidavits, after which the moving party opens and closes the argument. The decision of the court may be rendered at the hearing of the motion may be taken under advisement and the verdict rendered at a subsequent sitting of the court.

The court will not upon motion make an order which will decide the principal point in the case, except upon consent of all the parties affected by it. For instance, if the bill is filed to enforce the specific performance of a contract, and the only question in dispute is the title of the vendor, the contract being admitted by the answer, the court will upon motion direct a reference to a master to enquire into the title, but the court will not upon motion before the hearing inquire into any other objection.

Like V Beresford, 3 Bro. C.C. 366

Moss. V. Matthews, 3 Ves. 279

--o--o--o--o--o--o--o--o--o--





## CHAPTER XIX

---oOo---

## PETITIONS.

Petitions are entitled in the court in cause and addressed in the same manner as a bill.

A petition is not the proper proceeding unless all the parties interested in the subject matter have been or may be brought before the court. Therefore when it is necessary to issue processes to bring interested parties before the court a bill and not a petition should be filed.

Ledyard's App. 51 Mich. 623

Bank V. Byles, 67 Mich. 297

The petition should briefly and clearly set forth the particulars of the case and conclude with praying the court to grant the order desired "or such other and further relief as may be agreeable to equity and good conscience." The petition must be signed and sworn to by the petitioner and also signed by the counsel.

Matter of Chrisite, 5 Paige, 242

When a person not a party to the original bill has an interest by way of title, lien or otherwise in the property which forms the subject matter of the suit, and such interest is liable to be affected by the proceedings, he may by petition apply to the court for leave to intervene for the protection of his rights, and such leave will be granted when the cause exists.

When leave is granted a party to intervene upon petition to the court, he must within the time given him by the court file his petition in the cause setting forth his rights and praying for the relief sought, and give notice of the filing thereof to the other parties to the cause.

Freeman V Howe, 24 How. 450

Stewart V Durham, 115 U.S. 61

Gumbel V Pitkin, 124 U.S. 131-143

Petitions are noticed, and heard in the same manner as motions.

## ORDERS.

Orders are either by common, special, or by consent.



A common order is one that the party is entitled to as a matter of course and is made without notice to the opposite party.

A special order is one made by the court upon special application, either ex parte or upon notice.

An order by consent is one made upon stipulation of the parties or solicitors.

All common orders and orders by consent of the parties, may be entered in the common order book in the register's office, at the peril of the party taking such order. The day on which the order is entered must be noted in the entry. All special orders made by the court must be entered in the record of the proceedings of the court. When an order is entered by consent, the consent must be in writing signed by the parties or their solicitors and filed in the cause.

Hammond V Place, Har. Ch. 438

Crone V. Ingell, 14 Mich. 339

Mich. rules 24

Orders for injunctions, and all other special orders, must be entered with the register before process issues.

Hoffman V Treadwell, 5 Paige 82

Skinner V Dayton, 2 Johns Ch. 226

#### NUNC PRO TUNC ORDERS

It frequently happens that the entry of a common order is not made at the proper time. In such a case, if no great length of time has intervened, a motion of course may be made to the court to enter the order nunc pro tunc; but after a considerable length of time, there must be notice of the motion given.

Williamson V Henshaw, 1 Pick. 129

Neither party can obtain any benefit from a decision of the court until the order thereon is drawn up and perfected. When the order granted is special in its provisions, the party in whose favor it is granted should submit a copy to the adverse party that he may submit amendments thereto if he desires. The draft and amendments are then given to the register that the order may be settled by him and entered. If the register is in doubt as to the decision of the court, he is, in such a case, to apply to the court to settle the order. It is the practice in

this state to have the court settle all orders over which there



is any controversy.

Whitney V Belden, 4 Paige 140

Earl of Fingal V Blake, 3 Molloy 50

#### SERVICE OF ORDERS.

Not all orders need be served, and whether or not an order must be served depends usually upon the form of the order. Special orders obtained ex parte, usually provide that the act designated shall be performed by the opposite party within the time specified, after service of the order. But where a special order is obtained upon notice the order usually provides that the act shall be performed within the time designated after entry of the order. The reason for this distinction is that the first instance the opposite party has no personal knowledge of the order until he is notified, and in the latter case he has such notice, having had notice of the motion for the order.

But in all cases as we have seen, where it is intended to bring the party into contempt for not complying with the order, notice must be served upon him personally. The service in such case is made in the same manner as notice of a decree, by delivering him a copy of the order and at the same time showing him a certified copy of the original order under the seal of the court.

Cooper 282

Laton V Seaman, 9 Paige 609

Young V Goodson, 2 Russ. 255

When the party has appeared by solicitor, and it is not desired to bring him into contempt, service of notice, when notice is necessary, upon the solicitor is sufficient.

Stafford V Brown, 4 Paige 360-362

#### ENFORCING ORDERS.

It is sometimes provided by statute that orders for the payment of money may be enforced by means of an execution running against the property of the defendant. At common law orders were, in general, enforced by process of contempt. Upon motion, and proof that an order had been personally served, for the payment of costs for instance, and that the order had not been obeyed, attachment issued and the defendant was committed to



prison for a contempt.

Dan'l Chr. P. 1454

### MODIFYING AND DISCHARGING ORDERS.

It is a general rule that every order made in the progress of a cause, may for cause shown, be modified or vacated at any time before the final disposition of the suit.

Ashe V Moore, 2 Wex. 383

Fanning V Dunham, 4 Johns Ch. 35

Isnad V Cazeaux, 1 Paige 59

An order will not be vacated, however, except to permit the party applying to secure rights that are meritorious. If he simply desires to delay a cause, or take advantage of some technical defense or objection, the court will allow the order to stand although the party has excused himself from all fault.

Champlain V Mayor of N.Y. 3 Paige 573

Townsend V Townsend, 2 Paige 413

Hunt V Wallis, 6 Paige 371

### INJUNCTIONS.

It is very frequently necessary for a court of equity to restrain a party from doing some particular act in order to prevent irreparable injury to another, or to maintain the statu quo pending the determination of the legal rights of the parties to the subject matter in litigation. This object is accomplished by the writ of injunction, a writ of the greatest importance and of very frequent use in this country during the past half century. We can do no more than merely indicate the existence and purpose of the writ, and refer the student to the exhaustive treatise on the subject by Dr. High.

A writ of injunction is a judicial process acting in personam requiring the party to whom it is directed to do or to refrain from doing some act therein specifically described. It is used both for the enforcement of a right and the prevention of a wrong, but it must be an actual right or a positive ~~wragn~~ wrong, and the withholding of the right or the doing of the wrong must work a positive injury to the person complaining or the court will not interfere.

McDonough V Calloway, 7 Rob La. 411

Goodrich V Moore 2 Minn. 49

Injunctions are either mandatory, commanding something to be done, or preventive, forbidding the doing of something. A mandatory injunction is seldom issued and then only upon the final hearing.





Robinson V Bryam, 1 Bro.C.C. 583  
Gale V. Abbott, 8 Jur.M.S. 987  
Worthington V. Green, 1 Mo. Ch. 97  
Rogers V Railroad, 5 C.E. Green, 379

With reference to their duration injunctions are either interlocutory or perpetual. Interlocutory injunctions are issued at any time during the progress of the suit, usually at the filing of the bill, to continue until the coming in of the answer, or to the hearing, or until the further order of the court. A perpetual injunction is never granted except at the final hearing and is usually a part of the decree.

Chapman V Harrison 4 Bland, 336

The sole object of an interlocutory injunction is to preserve the present situation of the parties, and therefore it will go no further than is necessary to preserve all the rights in issue between them in statu quo.

#### COMMON AND SPECIAL INJUNCTIONS.

A common injunction is one that issues to aid the court in granting the ultimate relief asked, which is something different from the injunction itself, while a special injunction is issued to prevent irreparable injury and the obtaining of which is the sole or principal object and purpose of the suit.

Purnell V Daniel, 8 Ired. Eq. 9  
Troy V Norman, 2 Jones Eq. 318  
Peterson V Mathis, 3 Jones Eq. 31

Special injunctions are not granted in the United States court except upon notice to the opposite party, and they continue in force until the next term of the court, or until the further order of the court.

U.S. Rule 55  
Rev. St. Par. 718-719-720  
Parker V Judges, 12 Wheat. 561

#### WHEN AN INJUNCTION BECOMES OPERATIVE.

An injunction becomes operative from the time the party to whom it is directed has actual notice. It is not necessary that he should be actually served with the writ, and therefore it may be served outside the jurisdiction of the court.

Ramsdale V Craighill, 9 Ohio 197  
Little V Price, 1 Md. Ch. 182



Milne V Van Buskerk, 9 Iowa 558

Osborne V Tenant, 14 Ves. 136

A perpetual injunction is one that is issued under a final decree, or an interlocutory injunction which is made perpetual by the final decree. By its terms the defendant is forever inhibited from doing certain acts, or making certain specific claims therein set forth, which would be contrary to equity and good conscience. Such an injunction will issue whenever it is necessary to protect the rights of the complainant.

Bushnell V Hartford, 4 Johns Ch. 301

Caruthers V Hartsfield, 3 Yerg. 356

Kenson V Kenson, 1 Bibb 184

Injunctions in this state may be granted by a circuit court commissioner. Mich. rule 21

#### WRIT OF NE EXEAT

A writ of ne exeat is the process of the court issuing under its seal to prevent a person who is a party to a suit from leaving the jurisdiction of the court. It is resorted to for the purpose of compelling a defendant to give bail conditioned that he will do and perform the decree of the court.

Gilbert V Colt, 4opk. 496

De Rivafrinoli V Consetti, 4 Paige 264

Gleason V Bisby, 1 Clark 551

The statutes of the united states provide that when a suit in equity is commenced, and satisfactory proof is made to the circuit court, or to the circuit court justice or judge, that the defendant designs quickly to depart from the U.S.; that there is due from him a certain sum or capable of reduction to a certainty; that complainant has no sufficient legal redress, and that irreparable injury or a denial of justice will be caused complainant if the defendant so departs, such court or judge may order the issuance of a writ ne exeat, upon which the marshall arrests the defendant and keeps him in custody, unless he gives security to abide the order and decrss of the court.

Rev. St. Par. 717

U.S. Rule 21

The writ may be applied for at any stage of the proceedings, after, but not before, the filing of the bill of complaint.

Dunham V Jackson, 1 Paige 629, Cas. Eq.Pl& Pr. 303

The application for the writ may be made ex parte. The application is founded upon affidavit or petition, and, unlike the writ of injunction, it need not be prayed for in the bill. The writ may be allowed by the same officers who are authorized to allow writs of injunction, and the officer making the allowance



directs in what amount the defendant shall give bail.

Gleason V Bsisby, 1 Clark 551

McNamara V Dwyer, 7 Paige 239

Denton V Denton, 1 Johns Chan. 364 - Cas. Eq. Pl. 303

Porter V Spencer, 2 Johns Ch. 169,

ditto, Cases Eq. Pl. & Pr. 304

The writ commands the sheriff to have the defendant personally to come before him and give bond in the penal sum endorsed the eon, that he will not go, or attempt to go, beyond the jurisdiction of the court -- at common law beyond the four seas-- and in default of his giving such bond that he be committed to prison.

Gilbert V Colt, 1 Hope. 500

Rice V Hale, 5 Cush. 238

Mich. rule 17

#### RECEIVERS.

A receiver is a suitable person appointed to take charge of property which is involved in the suit, when for any reason, the court regards the parties to the suit not the proper persons to have the custody or management of such property. The appointment of a receiver is discretionary with the court. When appointed he is regarded as an officer acting under the orders of the court. The power of appointment is usually called into action either to prevent fraud or save the property in litigation from material injury.

In re receivers Globe Ins. Co. 6 paige 102

Baker V Barkies, 42 Ill. 79

Vorhill V Hynson, 26 Md. 83-92

Mich. rule 31

U.S. C.C. Rules, 8-9-11

When the application for a receiver is made during the pendency of the suit and before a decree, there must be a foundation laid for the application in the bill, but the bill need not contain a prayer for a receiver. The application is made upon petition or motion, and notice which must be served upon the opposite party, unless he has absconded or has concealed himself to avoid the service.

Dowling V Hudson, 14 Beav. 423, 424

Pitcher V. Hilliar, 2 Dick. 580



## C H A P T E R XX

---oOo---

## PRODUCTION OF PAPERS.

It is the practice of the court of chancery to require the defendant to procure any papers in his possession relative to the matters in question, which the complainant of right ought to have the privilege of examining. It is the complainant's privilege to apply for the protection of such papers as a part of his general right of discovery.

Warick V Queen's college, L.R. 3 Eq. 683

Att'y Gen. V Thompson, 3 Hare, 106

When the complainant has books, papers or other documents in his possession, material for the defendant's defense, the defendant was required at common law to file a cross bill, by which means he obtained the same right for the protection of papers as the complainant had under his bill.

Kelly V Eckford, 5 Paige, 548

Ditto, Cases Eq. Pl. & Pr. 307

Denning V Smith, 3 Johns Ch. 409

When a bill is filed for the purpose of obtaining a partnership accounting, and the partnership books are in the hands of one of the partners., the court upon application will direct such books to be placed in the hands of an officer for the purpose of allowing the other partner to examine them.

Kelley V Eckford, 5 Paige 548

To obtain an order for the protection of papers or books, application is made to the court by special motion and the bill or affidavit made to sustain the motion, must show that the production of the papers or books is necessary to enable the party making application to prosecute or defend the suit.

## ABATEMENT AND REVIVOR

Abatement of a suit in equity is the effect produced by the happening of some event whereby the further progress of the cause is temporarily or permanently suspended.

Hoxie V. Carr, 1 Sumner 173

The abatement may be due to some event whereby the interest of one of the parties becomes extinguished, for instance,





when joint tenants, as such, are parties and one of them dies, in such a case the abatement is said to be as to a party; or, the abatement may be due to the transfer of the interest of one of the parties to a third person, for instance, when upon the death of one of the parties, his interest is vested in heirs or devisees, in such case there is an abatement as to the suit.

Leggett V Dubois, 2 Paige 211 - 212

Ditto Cases Eq. Pl. & Pr. 309

In the first instance there is no abatement as to the surviving parties, and the court will on the motion of either of the parties, order the cause to proceed between such survivors. But in the other case there is no longer the proper persons before the court against, or by whom proceedings can be had and the suit must therefore be revived.

Leggett V Dubois, 2 Paige, 211 - 213

When there is an abatement of the suit by the death or bankruptcy, for instance, of the complainant, no further proceedings can be had, as a general rule, until this defect has been cured, and if any proceedings are had, they will be set aside as irregular.

Insurance Co. V Slee, 2 Paige 365

Canhone V Vincent, 8 Sim. 277

The proceedings are merely suspended by the abatement and those already had in the cause are not annulled thereby. If a party has been imprisoned for contempt, abatement of the suit does not discharge him from custody, neither is a receiver discharged for that reason.

Dan. Ch. Pr. 225

1 Hogan 174

And the court will sometimes permit necessary proceedings to be had pending abatement. Thus orders will be made for the preservation of property, and proceedings had to punish a party for breach of an injunction.

Washington Ins. Co. V Slee, 2 Paige 365, 368

Hawley V Bennett, 4 Paige, 163

#### REVIVOR.

In many of the states the statutes provide that suits may be revived on petition. These statutory proceedings are usually confined to cases where the suit abates by the death of a party, the statute substituting a petition for a bill of revivor. When the abatement is one that can be remedied under the statute, the statutory proceedings are usually resorted to as being simpler



and more expeditious, but a party is not prohibited from resorting to a bill of revivor even in those cases where the statute has given ample relief by petition.

The statute is necessarily confined to those cases in which there can be no legal controversy with reference to the right of the party to revive the suit in his favor, or against whom it may be revived; in other words, to those cases where, at common law, an abatement could be remedied by a bill of revivor. It is laid down as a rule that a bill of revivor whenever by death of

one of the parties his interest vests as a matter of law in some other person, so that the only question for the court to determine is the question whether or not such person is the one designated by the law.

Story Eq. Pl. Par. 364

Freemantee V Karkhous, 2 J.J. Marsh (Ky) 303

Boynton V. Boynton, 1 Foster 246

#### ORIGINAL BILL IN NATURE OF BILL OF REVIVOR AND SUPPLEMENT.

But when the party against whom or in whose behalf the suit is sought to revive, is not designated by the statute as the person who represents the original party to the bill, but his representative character depends upon some question of fact, an original bill in the nature of a bill of revivor and supplement must be filed.

Douglass C Sherman, 2 Paige 358-360-301

Monteith V Taylor, 9 Ves. 615

Mendhom V Robinson, 1 My. & K. 217

The reason for the above rules is, that in the later class of cases, the title depending upon a question of fact, it is necessary to put the question of title in issue, that it may be litigated. If, for instance, one of the parties to a suit dies intestate, the interest which he represented goes to certain persons designated by the statute, the only question to be determined is the identity of the heirs. If, on the other hand, such person dies intestate, the question of the validity of the will must be determined -- litigated.

#### SUPPLEMENTAL BILLS.

When the bill becomes defective by some event occurring after it is filed and too late to be cured by amendment, or when by an event subsequent to the filing of the bill a new interest in the matter in litigation is claimed by one of the parties to the suit,



or a new party claims, otherwise than by mere operation of law, the interest which belonged to some other party at the commencement of the suit, a supplemental bill is the proper remedy to cure the defect.

Jones V Jones, 3 Atk. 110  
Dormer V Fortescue, Atk. 124-133  
Humphreys V Humphreys, 3 P.Wms., 349  
Pelkington V Moss, Madd 240, 461  
Knight V Matthews 1 Madd. 511- 304  
Usborn V Baker, 2 Madd. 379-539

It is filed on leave, to supply some defect in the structure of the original bill, caused by the happening of some event after the filing of the original bill.

Kennedy V Georgia St. Rk. 8 How. U.S. 586  
Winn V Albert, 2 Md. Ch. 42

It is not proper to file a supplemental bill to put in issue new matters which can be added to the bill by way of amendment. Therefore, if there has been no change in the parties and the bill is defective from the complainant having omitted to make certain allegations, through ignorance of fact, and no proofs have been taken, the complainant should apply to the court for leave to amend, and if he has filed a replication, to withdraw his replication.

Dias V Merle, 4 Paige, 259  
Colclough V Evans, 4 Sim. 76  
Stafford V Howlett, 1 Paige 200  
Chandler V Pettit, 1 Paige 168

If proofs have been taken he must in that event ask leave to file a supplemental bill.

Dias V Merle, 4 Paige, 259

Not all matters, however, that have arisen since the commencement of the suit can be put in issue even by a supplemental bill. If the complainant had no cause of action when the bill was filed he cannot cure the defect by putting in issue matters which have since occurred. He will not, for instance, be permitted to support a bad title held by him at the time the bill was filed, by subsequently acquiring a good one and set up such acquired title by a supplemental bill.

Tonkin V Lithbridge, Coop. R. 43  
Davidson V Foley, 3 Bro.C.C. 598  
Pritchard V. Draper, 1 Russ. & May., 191

The rule does not, however, bar a complainant who had a good inchoate title, from showing by a supplemental bill that such inchoate title has become vested through some formal act.

Mutler V Chanvoe, 5 Russ. 42  
Sadler V Lovett, 1 Molloy, 162



A supplemental bill cannot be filed without leave of the court first obtained. The motion for an order giving permission need not be noticed, however, unless an injunction is prayed for in the supplemental bill.

Eggs V Price, 2 Paige 333

Lawrence B Bolton, 3 Paige 294

Winn V Albert, 2 d. Ch. 42

### CROSS BILL

Formerly a defendant could not pray for any relief in his answer, except to be dismissed by the court with his reasonable costs and charges, and therefore, if he sought any other relief, he must do so by a bill of his own, filed in the same cause and designated a cross bill.

Morgan V Tipton, 3 McLean, 339

Cullom V Erwin, 4 Ala. 452

Under the practice in this state and in some other states, the defendant can, in his answer, ask for affirmative relief, thus in many instances doing away with the necessity of a cross bill. It is still, however, desirable, and in some cases necessary. It frequently happens that a complete decree cannot be made under the original bill, due to the fact that the conflicting rights of the defendants are not put in issue, or that some of the defendants are entitled to affirmative relief, and a cross bill or cross bills are necessary to bring the whole matter in dispute before the court. In such a case it becomes necessary for one or more of the defendants to file a bill against the complainant, and if they are necessary parties, against one or more of the defendants.

White V Buloid, 2 Paige 164

Anglo-Egyptian Co. L.R. 1 Ch. App. 108

Mich. Rule 11

A cross bill is regarded as a defense and the original and cross bills are considered together as constituting one suit.

Field V Schieffelin, 7 Johns Ch. 249-252

Cartwright V Clark, 3 Metc. 104

Formerly no person could be made a party to a cross bill who was not a party to the original bill, but now in many of the states new parties, when necessary, may be thus brought in.

Blodgett V Hobart, 18 Vt. 414

Brandon Mfg Co. V Prime, 14 Blatch. 371

Kennedy V Kennedy, 66 Ill. 190

Cobb V Baxter, 1 Tenn. Chan. 405

As to the proper practice in this state under rule 11,





which permits the defendant to ask for affirmative relief in his answer see:

McGuire V. O. Judge, 69 Mich. 593

Harkley V. Mack, 60 Mich. 591

Coach V. O. Judge, 97 Mich. 564; Cas. Eq. Pl. & Pr. 314

When an answer is drawn to fulfill the purposes both of an answer and a cross bill, the better practice would seem to be to draw the answer first, as you would do, if you intended to file a cross bill, and then add to the answer, thus drawn, the averments entitling the defendant to affirmative relief, which the cross bill if drawn, would have contained. In this way all confusion between the answer and the cross bill are avoided.

The proper time for filing a cross bill is at the time the answer is put in. If it is not then filed and no sufficient excuse is given for delay, the proceedings in the original suit will not be stayed.

White V. Buloid, 2 Paige 164

Josey V. Rogers, 13 Ga. 473

Irving V. DeKay, 10 Paige 319

The cross bill should be confined to the matters stated in the original bill and must not introduce new and distinct matters not embraced therein. If it should it would be an original bill as to such matters. It must not contradict the allegations made by the defendant in his answer to the bill, and it is proper, if not necessary, that the answer should set out all the allegations contained in the bill.

Harkley V. Mack, 60 Mich. 591

Irving V. DeKay, 10 Paige, 319, 322

Hudson V. Hudson, 3 Rand. 117

The original bill must be answered before the defendant will be permitted to file a cross bill.

Ballard V. Kennedy, 34 Fla. 483

After both causes are ready for a hearing either upon the pleadings, or pleadings and proofs, either party may obtain an order ex parte to have both causes heard together.

White V. Buloid, 2 Paige 164

U.S. Rule 72

Mich. Rule 20

If the original bill is dismissed it does not carry with it the cross bill if the cross bill sets up new facts and prays for affirmative relief.

Ballard V. Kennedy, 34 Fla. 483

Sowenstain V. Glidewell, 5 Dil. 325

ditto, Cas. Eq. Pl. & Pr. 311



## CHAPTER XXI

---oOo---

## BILLS OF INTERPLEADER.

When a person is in possession of a specific chattel, or a definite sum of money, which two or more persons claim adversely to each other, but in the same right, or privity of estate, he may exhibit a bill of interpleader against such adverse claimants and thus relieve himself from the liability incident to delivering the article, or the money, to the wrong claimant, by compelling them to litigate their adverse claims between each other.

Child V. Mann L.R. 2 Eq. 805-3-8

Bedell V Hoffman, 2 Paige 199

Green V Mumford, 4 R.I. 313

Kile V Goodrum, 87 Ill. App. 462

ditto, Cas. Eq.Pl. & Pr. 315

To entitle a party to file a bill of interpleader he must be a mere stake holder, having, himself, no interest in the property in controversy, so that when the court decrees an interpleader, he may step out of the case altogether.

Lincoln V R. & E. R.R. Co., 24 Vt. 639

Angell V Hadden, 15 Ves. 244

Bowditch V Soltyk, 99 Mass., 136

Strictly speaking, the complainant does not ask any relief against either of the defendants, but simply the aid of the court in determining to whom the property of right belongs, that he may deliver it to such rightful person and be relieved against the claims of the other.

Bedell V Hoffman, 2 Paige 199

Badeau V Rogers, 2 Paige 209

Lazin V Van Saun, 2 Green Ch. 325

The bill of interpleader presents in the first instance the right of the complainant to be relieved from litigation in accordance with the prayer of his bill that the defendants may be required to interplead. If his right to file the bill is put in issue, that issue must be first disposed of. If it is decided in favor of the defendants the bill is dismissed; if in his favor, the defendants are required to interplead. Then follows the second issue, title to the subject matter of the litigation.

There must be privity of some sort between the parties, such as privity of estate, title, or contract, and the claims must



be all of the same nature. If the adverse claimants assert rights under adverse titles, and have claims differing in their nature, the bill cannot be maintained. Thus when two assessing districts have assessed the same person for the same property in each district, claiming to act under the statute, the owner of the property may file a bill of interpleader against the two corporations, or when a tenant owes rent to his landlord, and two persons claim through the same title to be such landlord, the tenant may file a bill against both, but if in the latter case the claim of one is based upon a title paramount to the other, as when one claims under the original title, and the other under a tax title, a bill cannot be maintained.

M. & E. R.R. Co. V Clute, 4 Paige 384

Thompson V Ebblits, Wopk. 272

Stanley V Sidney, 14 N. & W. 800

Story Eq. Pl. Prac. 239

The claims of the several defendants must not only be substantially the same in their nature, but this must appear in the bill. The bill must also show that the defendants claim an interest in the whole subject matter of the suit and be so framed that the decree may embrace the whole of it.

Hoggart V Cutts, 1 Cr. & P. 197-205

Crawford V Fisher, 1 Ware 436-440

In stating the plaintiff's interest, it must appear affirmatively that he stands neutral as to the two defendants. If he has bound himself to pay one in any event, his bill will be dismissed.

Zouche V Harrison, 140 Pa. St. 430

National L. Ins. Co. V Pingry, 141 Mass. 411

Atkinson V Flannigan, 70 Mich. 639

Wakeman V Kingsland, 46 N.J. Eq. 113

If the matter in dispute is money in the hands of the complainant he should offer in his bill to bring it into court, to enable the court to direct what shall be done with it upon the application of either of the other parties.

Shaw V Foster, 8 Paige 339

As a general rule a sheriff, who has seized property under an execution which is claimed by a party other than the defendant named in the writ, cannot file a bill of interpleader making such adverse claimants parties. If, however, there are conflicting equitable claims, or claims due to some event happening after the levy, for instance, the bankruptcy of the execution defendant, he may file a bill.

Tufts V Hardinge, 5 Jur. N.S. 116

Child V Mann, L.R. Eq. 305-7

There are conflicting claims sometimes to funds in the



in the sheriff's hands arising from the sale of property on several executions running against the same person and in favor of divers persons. In such a case it is held in Ark. that the sheriff may file a bill of interpleader.

Lawson V. Jordan, 19 Ark. 297

But as a general rule this cannot be done.

Shaw V. Foster, 8 Paige 339

Parker V. Barker, 42 N.H. 73

Nash V. Smit, 3 Conn. 421

In theory the bill is filed solely for the benefit of the complainant to relieve him from vexatious litigation and liability to pay the same amount twice. The court will not permit the bill to be filed if there is collusion between complainant and one of the parties. The complainant must file with the bill an affidavit that there is no collusion between him and either of the parties; and if there are several complainants they must all join in the affidavit.

Atkinson V. Lonks, 1 Cow. 691

Fahey V. Blood, 30 N.H. 354-361

Story Eq. Pl. Prac. 291-7

Shaw V. Foster, 8 Paige, 339

In the bill of interpleader the complainant sets forth fully the subject matter of the controversy; that the property is in his hands; that he has no interest in it; that the defendants named claim the property and the nature of the claim, but not their title. This part of the bill must be drawn so as to show that the complainant has a right to compel the defendants to interplead. The complainant must also aver, that he is ignorant, or in doubt, as to which of the parties are entitled to the property. The bill prays that the defendants may interplead, so that the court may determine to whom the property belongs. It usually prays, also, if the matter of controversy is a money demand, that the complainant may pay the money into court. If a suit at law has been commenced by either, or both the defendants, or threatened by either or both, the bill also prays, that the defendants may enjoin from further proceedings against the complainant at law.

Union Bk. V. Kerr, 2 Md. Ch. 430

French V. Robecard, 50 Vt. 43

#### BILLS TO PERPETUATE TESTIMONY

Any person, who would, under the allegations contained in his bill, become entitled, upon the happening of some future event, to an estate, or interest in any property, real or personal, the right to which cannot by him be legally investigated, by being





brought to trial before the happening of such event, may maintain a bill to perpetuate the testimony material for establishing such estate, or interest.

Lord Dursley V Fitzhardinge, 6 Ves. 251-259

Allen V Allen, 15 Ves. 129-135

Booker V Booker, 20 Ga. 777,

ditto, Cases Eq. Pl. & Pr. 316

The interest which the complainant has must be a present interest and not a mere contingent interest. But if it is a present interest, it is wholly immaterial how minute it may be, or how remote the possibility may be, of the happening of the event upon which it is to be enjoyed.

Lord Dursley V Fitzhardinge, 6 Ves. 251-259

Allen V Allen, 15 Ves. 129-135

The bill must set forth the matter touching which the complainant desires to take testimony. It must show that he has an actual and not a contingent interest, and that the facts to which the proposed testimony relates cannot be investigated immediately in a court of law or equity, or that before the facts can be adjudicated upon, the evidence of such witness, is in danger of being lost by his death or departure from the state. In the latter case the bill must be accompanied by affidavit setting forth the danger of the loss of such testimony.

Philip V Carew, 1 P. Wms. 116-7

It would seem that the bill is demurrable unless it shows that the complainant's interest is actual, and not capable of being barred by the defendant; that the interest cannot be investigated immediately, and that the defendant has an interest to contest the complainant's claim.

Allen V. Allen, 15 Ves. 129-135

Larkins V. Ayleworth, 1 Vern. 105

Dursley V Fitzhardinge, 6 Ves. 252

Ellice V Roupelle, 32 Beav. 301

The defense to a bill to perpetuate testimony is by demurrer, plea or answer, as in other cases. The cause, however, is never brought to a hearing. After the cause is at issue upon the merits a commission issues for the examination of witnesses.

Vaughan V Fitzgerald, 1 Sch. & Lef. 316

At common law the court would not permit the testimony to be published except in support of a suit or action, and not then, unless the witness, whose testimony had been taken, was dead, or sick; or so aged, or infirm, that he could not be examined in the cause.

Morrison V Arnold, 19 Ves. 669

Jackson V. Rice, 3 Wend. 180

Jackson V Perkins, 2 Wend. 303



To obtain the order of publication, a notice of the motion must be served, which must be supported by an affidavit, that the testimony is necessary to be made use of in the complainant's behalf, that the witnesses are dead or so sick, aged or infirm, that they cannot travel to give evidence in the cause, or that they are out of the state. Upon such a showing the order of publication is made. If a portion only of the testimony taken is used, the order will designate what testimony is to be published.

Bills to perpetuate testimony are seldom resorted to at the present time, the statutes in many of the states having provided a cheaper and more expeditious method of accomplishing the same purpose.

#### BILL TO EXAMINE WITNESSES DE BENE ESSE

This specie of bill bears a close analogy to bills to perpetuate testimony. But the two differ widely, standing upon distinct considerations. A bill to perpetuate testimony cannot be maintained except in cases where no suit can be commenced in which the desired testimony can be taken. Bills to take testimony de bene esse are on the other hand sustained in aid of a suit already pending.

Story Eq. Pl. Prac. 250

Angell V Angell, 1 S. & T. 83

The object of the bill is to take the testimony of witnesses to be used in a pending action at law in case where delay may result in the loss of such testimony, and the bill may be filed by the plaintiff or defendant in such suit at law.

When a suit at law can be commenced immediately, the suit must be actually commenced before the bill is filed. If such suit cannot be commenced, then a bill to perpetuate testimony must be filed.

Angell V Angell, 1 S. & T. 83-93

To entitle a party to maintain this bill he must aver:

1-That there is a pending suit, and the exact nature of the controversy in which the testimony of the witness named will be material.

2-That the suit is in such a condition that the depositions of such witnesses cannot be taken by the ordinary methods prescribed by law, and that the aid of the court of equity is necessary to obtain their testimony.

3-The facts which the plaintiff expects to establish by the testimony of the witnesses to be examined, that the court may see that they are material to the controversy.



4-The necessity for taking the testimony, and the danger that it may be lost by delay.

Richter V Jerome, 25 Fed.R. 679,

ditto Cases Eq Pl. & Pr. 321

The danger of the loss of a witness's testimony may arise from the age of the witness or his state of health, or from the fact that he is the only witness by whom a given fact can be proved. In this later case the court, in view of the uncertainty of life, will admit the testimony of such witness to be taken although he is neither sick, infirm or aged.

Shirley V Earl, of Penns, 1 P. Wms. 97

Pearson V Ward, 2 Dick. 648

As a general rule a witness is not treated as being aged unless he is seventy years of age.

Fitzhugh V Lee, Amb. 65

But if a witness is infirm, or in ill-health to an extent to endanger life, or to prevent his attendance at the trial, the court will permit his testimony to be taken, no matter what his age may be.

Phillips V Carew, 1 P. & Wms. 117

If a witness is going out of the jurisdiction of the court his testimony also may be taken. At common law this was the case, although the witness was going from one division of the kingdom to another, as from ~~Scotland~~ England to Scotland. x

Botts V Verelst, 2 Dick. 454

In framing a bill to examine witnesses de bene esse, care must be taken to allege all the material facts upon which the right to maintain the bill can be maintained, that is, that the witness whose testimony you desire to take is aged, infirm, about to leave the jurisdiction of the court, or is the only witness by whom you can prove a material fact, as the case may be. The bill should be supported also by an affidavit showing the circumstances by which the evidence intended to be taken may be otherwise lost.

Angell v Angell, 1 S. & S. 83-91

Phillips V Carew, 1 P. Wms. 117

Story Eq. Pl. Par. 257

The affidavit must be positive as to the material facts, and not rest upon belief merely. Thus where a bill was filed to take the testimony of a witness alleged to be the only witness, and the affidavit alleged that he was the only witness in the belief of the party, it was held insufficient and that the affidavit should have stated positively that he was the only witness who knew the fact.

Rowe V \_\_\_\_\_, 13 Ves. 260



Testimony taken de bene esse is only valid in the cause in which it is taken, and against those who are parties to such cause. In other respects the rules applicable to bills to perpetuate testimony apply to these bills.

Bills de bene esse are very seldom resorted to at the present day. The statutes of the several states provide much more simple and direct methods for taking the testimony of witnesses under those circumstances, which would permit a bill to be filed in equity at common law. But occasionally a case is found which does not fall within the provisions of any statute.

Richter v. Jerome, 25 Fed. R. 679

ditto, Cas. Eq. Pl. & P. 321

There are several bills which we do not notice for the reason that their form depends largely upon local statutes; for instance, bills of divorce, bills filed by judgment creditors against their debtors, bills for the partition of land, bills for the foreclosure of mortgages, etc.

Having now gone over the various steps taken in the progress of a suit in equity we will close this short synopsis of equity pleading and practice with Lord Redesdale's analysis of the different kinds of bills. He says: "The several kinds of bills have been usually considered as capable of being arranged under the general heads:

I-Original Bills, which relate to some matters not before litigated in the court by the same parties standing the same interests.

II-Bills not original which are either an addition to, or a continuance of, an original bill, or both.

III-Bills which, though occasioned by or seeking the benefit of a former bill, or of a decision made upon it, or attempting to obtain a reversal of a decision, are not considered as a continuance of a former bill, but in the nature of original bills. And though this arrangement is not perhaps the most perfect, yet, as it is nearly just, and has been very generally adopted in argument, and in the books of reports of practice, it will be convenient to treat the different kinds of bills with reference to it.

#### BILL OF REVIEW.

Until a decree has been enrolled the cause is so far still pending that the court may, upon petition, change and modify the decree, but upon enrolment the matter is res adjudicated, and no omission, mistake or error can be corrected except by a bill of review.

The ordinance of Lord Bacon is still the law governing this class of cases. It provides: "No decree shall be revised, altered, or explained, being one under the great seal, (enrolled)





but upon a bill of review, and no bill of review shall be admitted, except it contains either error in law, appearing in the body of the decree, without further examinations of matters of fact, or some new matter which hath arisen after the decree, and not any new proof, which might have been used when the decree was made. Nevertheless, upon new proof that has come to light after the decree made, and could not possibly have been used at the time when the decree was passed, a bill of review may be grounded by the special license of the court, and not otherwise."

Dexter V Arnold, 5 Mason 303

ditto, Cases Eq.Pl.& Pr. 277

Will V Phelps, 101 Fed.Rep. 650

ditto, Cases Eq.Pl.& Pr. 297

I-A bill may pray relief against an injury suffered, or only seek the assistance of the court to enable the defendant to defend himself against a possible future injury, or to support or defend a suit in a court of ordinary jurisdiction. Original bills have, therefore, been again divided into bills praying for relief, and bills not praying relief. An original bill praying relief may be:

1-A bill praying the order or decree of the court touching some right claimed by the person exhibiting the bill, in opposition to some right claimed by the person against whom the bill is exhibited.

2-A bill of interpleader when the person exhibiting the bill claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons for the safety of the persons exhibiting the bill.

3-A bill praying the writ of certiorari to remove a cause from an inferior court of equity.

An original bill NOT praying relief may be:

1-A bill to perpetuate the testimony of witnesses.

2-A bill for the discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power.

II-A suit imperfect in its frame, or which becomes so by accident, before its end has been obtained, may, in some cases, be rendered perfect by a new bill, which is not considered an original bill, but merely as an addition or continuance of the former bill, or both. A bill of this kind may be:

1-A supplemental bill, which is merely an addition to the original bill.

2-A bill of revivor, which is a continuance of the original bill, when by death or otherwise some party to it has become incapable of prosecuting or defending the suit.



3-A bill both of revivor and supplement, which continues a suit upon an abatement and supplies defects which have arisen from some event subsequent to the commencement of the suit.

III-Bills for the purpose of cross litigation of matters already pending before the court, or controverting, suspending, avoiding or carrying into execution a judgment of the court, or obtaining the benefit of a suit, which the plaintiff is not entitled to ass to or continue for the purpose of supplying any defects in it, have been generally considered under the head of bills in the nature of original bills, though occasioned by, or seeking the benefit of former bills, and may be:

1-A cross bill, exhibited by the defendant in a former bill, against the plaintiff in the same bill, touching some matter in litigation in the first bill.

2-A bill of review to examine and revise a decree made upon a former bill, and signed by the judge or chancellor, and enrolled, whereby it has become a record of the court.

3-A bill in the nature of a bill of review, brought by a person not bound by the former decree.

4-A bill to impeach a decree on the ground of fraud.

5-A bill to suspend the operation of a decree on special circumstances, or to avoid it on the ground of matter arisen subsequent to it.

6-A bill to carry a decree made in a former suit into execution.

7-A bill in the nature of a bill of revivor, to obtain the benefit of a suit after abatement in certain cases which do not admit of the continuance of the original bill.

8-A bill in the nature of a supplemental bill, to obtain the benefit of a suit, either after abatement in cases which do not admit of a continuance of the original bill, or after the suit has become defective without abatement, in cases which do not admit of a supplemental bill to supply that defect."

It must be born in mind that this classification of bills is principally valuable in giving one a comprehensive and intelligent view of the entire field of equity pleading and practice. If in any given case the facts entitle the plaintiff to relief, and the pleader has drawn his bill with due formality and clearly sets forth such facts, he will be entitled to relief although he may have misnamed his bill.

Dayton v. Dayton, 63 Mich. 437

Ridgely v. Bond, 18 Md. 433

Arnold v. Meyers, 1 Lea (Tenn) 315

Carneal v. Wilson, 3 Litt. (Ky) 90

Northman v. Ins. Co. 1 Tenn. Chy. 542.



## I N D E X

--oOo--

Abatement,	121
Address of bill,	2, 36
Admissions,	
upon the record,	94
by agreement	98
Amendments,	14
Answer,	12, 83
form of,	13, 85
amendment of,	89
supplemental answers,	90
joinder of several answers,	91
taking answers off the file,	91
title of,	1
two-fold character of,	83
Appointment of receivers,	15
Appeals,	19
Application for redress,	20
Attachment, writ of,	110
Averment of jurisdiction in bill,	3
 Bill in equity,	
bills of interpleader,	127
bills to perpetuate testimony,	129
bills to examine witnesses de bene esse,	131
cross bill,	125, 135
definition,	26
essentials of,	27
general classification,	134
parts of,	1
supplemental bill,	123
bill of review,	133
Charging part of the bill,	3, 46
Confederating part of the bill,	2, 46
Cross bill,	125



## I N D E X

Decrees,	18, 105
enrollment of,	107
final,	105
form of,	106
interlocutory,	105
parts of,	18
rectifying,	18, 107
settling,	106
who are bound by,	108
enrollment of,	109
Defendant,	
default of,	53
appearance of,	56
Defense,	
modes of,	23
upon the merits,	24
Demurrers,	8, 58
argument of,	69
form of,	9, 66
general and special,	66
ore tenus,	68
separate demurrers,	65
speaking demurrers,	68
to the jurisdiction,	61
to the person,	61
to the matter of the bill,	61
to the substance,	62
to the form,	63
to discovery,	63
Disclaimer,	8, 57
Dismissing bill at hearing,	103
Execution, writ of,	110
Feigned issues,	104
Filing the bill,	51
Hearing the cause,	17, 102





## I N D E X

Injunctions,	117
mandatory & preventive,	117
common & special,	118
when become operative,	118
Interpleader,	127
Interlocutory proceedings,	14, 111
Interrogating part of the bill,	3, 47
Introduction of bill,	2, 38
Jurat & Signature,	5
Jurisdiction clause,	3, 46
Misjoinder of parties,	34
Motions,	111
of course,	112
special,	112
ex parte,	112
Multifariousness,	35
Ne exeat, writ of,	119
Orders,	114
nunc pro tunc,	115
service of,	115
enforcing of,	116
modifying & discharge of,	117
Payment of money into court,	15
Parties to suit in equity,	31
formal,	32
indispensible,	32
Petitions,	114
Plaintiff's statement,	21
Plaintiff's application for redress,	
requisites of,	20
Pleadings, defined,	20
object of,	20



## I N D E X

Pleas,	9,	71
affirmative or pure,	9,	75
anomalous,	9,	75
grounds of,		78
forms of,	11,	78
in bar,		10
founded on statute,		10
founded on matter of record,		10
"       "       "       in pais,		10
in abatement,		23
in confession and avoidance,		24
negative,	9,	75
overruling of,		80
replication to,	11,	25
to the jurisdiction,		10
to the person of plaintiff,		10
to bill or form thereof,		10
Prayer for relief,	4,	48
for redress,	4,	49
Production of papers,		121
Receivers,		120
References,		15
Replication to plea,	12,	25
"       to answer,	16,	93
Revivor,		122
Stating part of bill,	2,	39
degree of certainty,		39
matter of allegation,		40
manner of allegations,		41
Subpoena & Service,	5, 49,	52
Suit in equity,		1
when commenced,		52
who may sue,		29
Supplemental bills,		123
Testimony,	16,	99
Writ of execution,		110
Writ of attachment,		110
Writ of ne exeat,		119



# OUTLINE OF COOLEY ON TORTS.

BY

Prof. Wilgus.

\*\*\*\*\*

## CHAPTER XVI.

### Deceit or Fraud.

#### I. Definitions:

Fraud is a deception or circumvention, by any kind of artifice, practiced by one person upon another, whereby the former interferes with or deprives the latter of his legal rights, or obtains an unjust advantage over him. Fetter's Equity, p. 130; Robinson's El. Law, § 315.

It is either actual or constructive. Cooley, 554.

"Actual fraud, consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed." Cooley, 555. "Leading a man into damage by wilfully or recklessly causing him to believe and act on a falsehood."

Hale, Torts, § 167. Any artifice by which a person is deceived to his disadvantage,"- Bispham's Eq., § 206.

Constructive frauds are those by construction of law, arising from the intrinsic nature of the bargain itself, or from the circumstances and conditions of the parties.-

Cooley, 554; Bispham's Eq., § 205.

They are of two general kinds: Those,

1. Affecting third parties, by indirectly depriving them of a right,--such as making a voluntary conveyance of property without providing for the payment of debts; or by giving a secret lien on property retained in possession, and thereby misleading those dealing with the party.
2. Affecting a party to the transaction, by obtaining an advantage, or accepting benefits when it would be unconscionable to do so, arising usually from the exercise of undue influence in confidential relations. Cooley pp. 554-5. (See next chapter).



II. Elements of an action for actual fraud:1. Allegations necessary

1. That certain representations were made;
2. In order to influence plaintiff's conduct;
3. That plaintiff acted on them;
4. That they were untrue;
5. " plaintiff was damaged;
6. " the damage was proximately caused by the deception.

2. Proof:

1. Burden is upon the party alleging fraud, as fraud ~~is~~ is not generally presumed in the absence of any evidence.
2. It however may, and generally must, be established by indirect or circumstantial evidence, in which the jury will draw such inference as the facts justify. A preponderance of evidence is sufficient.

III. As to the method of making the representations,--they may be made,

1. By words, either oral, written, or printed, or by encouraging a known delusion.
2. By acts, such as nods, winks, smiles, shake of the head, &c
3. By silence, when there is a duty to speak.

(a) As a general rule there is no duty to speak unless called upon, and then not generally a duty to speak, but only to speak the truth if information is volunteered. The general rule being,--caveat emptor,--let the purchaser beware, or take care of himself. If the sources of information are equally open to both parties, and no trick or artifice, or false or misleading partial statement is resorted to by any one to mislead the other, and an advantage is gained by one over the other, such advantage is legitimate and the loser must charge it to his own carelessness.

(b) But silence is fraudulent when

1. Active steps are taken to prevent the discovery of the truth;
2. Statements made, tho true, are misleading because incomplete or partial.
3. There is a duty to speak;

(1) By an insolvent purchaser as to his financial condition, if he intends not to pay,--or, by some cases if he has no good reason for believing he can pay. Cooley, 559.

[illegible]

1. The first group of people who were  
2. ... of the ...  
3. ...  
4. ...  
5. ...  
6. ...  
7. ...  
8. ...  
9. ...  
10. ...

of the ... to the ... of ...

$$f(x) = \frac{1}{2} \left( \frac{1}{x} + \frac{1}{x^3} \right) = \frac{1}{2} \left( x^{-1} + x^{-3} \right) \quad (1)$$

1. The first part of the document is a letter from the President of the United States to the President of the Republic of China, dated January 1, 1955. The letter is signed by Dwight D. Eisenhower and is addressed to Chiang Kai-shek. The letter discusses the relationship between the United States and the Republic of China, and the importance of the Republic of China in the Pacific region.

...the ... ..  
... ..  
... ..  
... ..



- (2) By one who pays by check on a bank, if he has no expectation that funds to his credit will be there to meet it. Cooley, 560.
- (3) When a material change has taken place in the condition of things pending a negotiation, known to one and not to the other. Cooley, 560.
- (4) When one sells an article known by him to be unfit for the specific purpose for which it is known to be purchased. Cooley, 560.
- (5) By the retail seller to the consumer, of the condition of foods, provisions, or animals. There is here a warranty of the suitability of the foods and provisions, and that the animals have no contagious disease, unless the purchaser is in some way warned. Cooley, 561-2.
- (6) By creditors having special means of information as to the financial condition of their debtors or servants; they owe a duty to the surety of such debtor or agent to give information or allow it to be obtained.
- (7) By persons selling property the title to which they know is defective.
- (8) By one standing by while his property is being sold to another, to make known his rights to the property.

Silence in these cases, where one is misled thereby to his damage is a fraudulent misrepresentation.

#### IV. The representation must relate

- 1. To the existence or non existence of a present or past material fact; and not generally to the existence or non-existence of a future fact; statements as to the latter amount only to the expression of opinions, or the making of promises,--which, if upon valuable considerations, may be valid contracts of warranty, and if they do not come to pass as promised, will give an action for breach of contract of warranty, but not an action ex delicto for fraud.
- 2. Not generally to promises.  
But there are cases in which the promise itself is the means of accomplishing the fraud, as when an insolvent purchaser purchases goods with an intention not to pay for them,--in the purchase is an implied promise to pay,-



or in other words the representation of a present intention to pay, which is false. So too, where A, a beneficiary under a will, promises B., a dying testator, that he need not provide in a codicil for the benefit of C., because he, A., will make the desired conveyance, an intention not to carry out the promise is fraudulent. Cooley, 569.

3. Nor Opinions: Expressions of opinions, however positive and false, are not generally fraudulent,--for the reason that persons do not usually rely upon expressions of opinion.

False assertions of value, profits, or cost, (according to some cases) are mere expressions of opinion, and not statements as to facts.

Exceptions to this rule exist when the opinion is that of an expert, or one having special means of knowledge, to one who has no such special means of knowledge or experience,--like a purchaser from a dealer of dry goods having expert knowledge of such goods. Cooley, 565.

4. Nor matters of domestic law: A misrepresentation as to what the law of the state where the transaction occurs, or the legal effect of a transaction, is not a fraudulent misrepresentation of a present or past fact,--for the reason that all persons are supposed to know the law.

But a known false statement as to what the law of a foreign state is, is a misrepresentation of fact amounting to fraud, if the other elements are present,--the reason being that persons are not supposed to know the foreign law. Cooley, 568. 9 Pick. (Mass.) 112.

- V. The representations must be material,-- such "as like poison, entered into the bargain, tainted and destroyed it"; they must be of decided character, calculated to mislead by inducing action. Whether the representation is a material or not depends very largely upon the facts of the case,--but perhaps it is safe to say that all statements are material, which if known to be false, the contract would not have been made. 35 Mo., 439; 156 Mass., 318. Clark, Contracts, p. 334; Cooley, 580.

- VI. They must have been acted on, by one having the right to rely on them.

Duty of self protection.

1. There is a general duty on every person to exercise ordinary care for his own protection. If therefore the loans

4. For the purpose of this section, the following definitions shall apply:

[illegible]

1. The first part of the document is a letter from the President of the United States to the President of the Republic of China, dated January 1, 1955. The letter is signed by Dwight D. Eisenhower and is addressed to Chiang Kai-shek. The letter is a formal communication and is written in a respectful and diplomatic tone. It discusses the relationship between the United States and the Republic of China and expresses the President's confidence in the Republic of China's leadership.

of knowledge are equally available, one who carelessly trusts himself in the hands of one who has an interest to mislead him, rather than use the means at hand for self protection, will not be heard to complain. Cooley, 570.

(a) But where the means of self protection are not at hand or readily available, statements of the party having full opportunity of knowledge made to the other party are in the nature of warranties,--and if false give a right of action. Cooley, 571.

(b) So, representations made for the express purpose of disarming vigilance, or preventing the use of information that could be obtained, and having that effect, when ordinary prudence has been exercised, are fraudulent, if false. The question then becomes a question of due care for his own protection upon the part of the plaintiff. Cooley, 571-3.

This rule is applied when signatures of persons are obtained to documents which they cannot or have neglected to read. Also in representations relating to records of title;--as where a purchaser, who was about to examine the title to land which he was about to purchase, the seller represented that he had just had the record examined and found it all right. Cooley, 573-6; 61 Pa. St., 427.

## 2. Who may rely on representations:

(a) In general only the party to whom they are made, or are meant to be made, can rely on them; but some representations are made to the public at large for the purpose of inducing any one of the public to act upon them,--in which event any one who sees or hears them may rely on them. But in general, one to whom they are not made, though overheard, or seen, has no right to rely upon them, or if he does and is damaged cannot complain. Fraudulent prospectuses of corporations to induce subscriptions, false declarations of dividends, or false reports, made for a like purpose are made to the public, and any one who acts upon them to his damage can complain. Cooley, 577.

(b) When a person by fraudulent representations made to one party to a contract induces him to break the contract, the other party to the contract may hold the party making fraudulent representations. Cooley, 581.

1000  
1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

- VII. The representations must be false in fact, and made either,
1. With knowledge of their falsity, and with intent to deceive; or,
  2. With no knowledge and no belief, but recklessly made with a like intent; or,
  3. Supposing them to be true, but with no reason for such belief, but were nevertheless made positively for purpose of inducing action. Cooley, 582-6.

Or as stated in Hale on Torts, § 169, Jaggard, § , there is a fraudulent intent, when

- (1) The party knew his statement to be false; or
- (2) Having no knowledge of their truth or falsity, he did not believe them to be true; or
- (3) Having no knowledge of their truth or falsity, he yet represented them to be true of his own knowledge.

VIII. Remedies: These are,

1. Rescinding the contract by the person defrauded, return what was received, and sue to recover what has been delivered under it. Complainant must act promptly. Cooley, 589.
2. Affirm the contract and sue for damages for the fraud; or the party may so affirm the contract, with full knowledge of all his rights as to make it clear he intends to abide by the contract and waive any remedy he might have had. Cooley, 591.
3. The courts may deny redress when both parties are equally culpable, as when both attempt to defraud a third, and one obtains an advantage over the other,--when there was no special confidential relation existing between them. Cooley, 591.

IX. Duress,-- is a species of fraud due to compulsion; and is either

1. Of the person, accomplished by  
     imprisonment, unlawful, or  
     "                      lawful, if something is wrongfully demanded and given up.  
     Threats of loss of life, limb, or liberty.  
     Show of force which cannot be resisted.
2. Of goods, by forcibly seizing or withholding goods, until something is given for their release; or  
     by taking them under color of legal authority that is void. Cooley, 592-3.

1. The first of these is the fact that the  
 2. the other is the fact that the  
 3. the other is the fact that the  
 4. the other is the fact that the  
 5. the other is the fact that the  
 6. the other is the fact that the  
 7. the other is the fact that the  
 8. the other is the fact that the  
 9. the other is the fact that the  
 10. the other is the fact that the

FILE \_\_\_\_\_

1. The first part of the report is a brief history of the project, which was initiated in 1964 by the Department of the Interior, Bureau of Land Management, and the National Aeronautics and Space Administration. The project was designed to study the effects of the Vietnam War on the environment, particularly in the area of land use and resource management. The project was funded by the Department of the Interior, Bureau of Land Management, and the National Aeronautics and Space Administration.

11. The first of the two main directions of development  
 12. is the "horizontal" one, which is characterized by the  
 13. fact that the same type of work is performed by different  
 14. groups of people in different parts of the country. This  
 15. is the case with the work of the "horizontal" groups of  
 16. people, who are engaged in the same type of work in  
 17. different parts of the country. This is the case with  
 18. the work of the "horizontal" groups of people, who are  
 19. engaged in the same type of work in different parts of  
 20. the country. This is the case with the work of the  
 21. "horizontal" groups of people, who are engaged in the  
 22. same type of work in different parts of the country.

the  $\mathcal{L}_1$  norm,  $\mathcal{L}_2$  norm, and  $\mathcal{L}_\infty$  norm. The  $\mathcal{L}_1$  norm is the sum of the absolute values of the elements in the vector. The  $\mathcal{L}_2$  norm is the square root of the sum of the squares of the elements in the vector. The  $\mathcal{L}_\infty$  norm is the maximum absolute value of the elements in the vector.

$$v_0 = 0.01 \text{ m/s} \quad \text{and} \quad \frac{v_0}{v_{\text{max}}} = 0.01 \quad \text{for} \quad \frac{v_0}{v_{\text{max}}} = 0.01$$

1. *Phragmites australis* (Cav.) Trin. ex Steud. (Common reed)

16. *Chrysomelidae* (1000) 1000

1. THE UNITED STATES OF AMERICA

[illegible]



- X. Extortion, is a fraud by the exaction of illegal fees.

## C H A P T E R XVII.

### Wrongs in Confidential Relations.

#### I. Definitions:

The wrongs arising in these relations are usually constructive frauds, as defined above in Chapter XVI.; though in some cases they are actual frauds, accomplished through deception-- For the most part they are accomplished by

1. Undue influence,-- by which is meant the exercise of an influence arising from a relation of confidence, trust, or superiority, to obtain an undue or unjust advantage of another. The influence to be undue is more than mere persuasion, by presenting reasons, and less than coercion by force of threats or duress,--but yet an overcoming of the will by the exertion of a control or influence due to a confidence reposed, weakness of intellect, or stress of circumstances, whereby one is led to do what he would not otherwise do, to his disadvantage. Cooley, 595; 27 Am. & E. Enc. 453.

Or as defined in the Cal Civil Code, Undue Influence consists,

- (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority, for the purpose of obtaining an unfair advantage over him
- (2) in taking an unfair advantage of another's weakness of mind; or
- (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress. § 1575. • Dakota Code, § 886.

2. The Confidential relations, are those in which one party trusts either wholly or partially his pecuniary or other interests to the fidelity and integrity of another, by whom he expects them to be guarded and protected. Cooley 595.

They may arise either from (A) Status, or (B) Convention.

- A. Those arising from status, are principally the domestic relations, of husband and wife, persons engaged to marry, and parent and child.



## (1) The relation of husband and wife.

- (a) In order that the fullest confidence may exist between the husband and the wife, they are shielded from testifying to communications between themselves, and either for or against one another; yet if one violates this confidence by divulging such communications, there is no remedy.
- (b) They are also allowed, or even encouraged, to perform for one another generous acts of kindness prompted by affection and good will.
- (c) Their business dealings, however, between themselves, are carefully scrutinized, especially in favor of the wife, where the husband might exercise his influence to obtain undue advantage. And "Any undue advantage gained by the use of the marital relation is a legal fraud on the wife which courts of equity will not allow to stand to her prejudice." And under statutes in some cases she can sue at law. Cooley, §595-7.

(2) Parties engaged to marry.(a) Seduction.

The wrong accomplished here is most frequently seduction, and by most cases is considered a gross fraud if accomplished under promise to marry, which was not intended to be fulfilled. Some few cases hold that if the seduction is consented to, though the consent is fraudulently obtained, the parties are in equal fault, and no right of action exists. Cooley, 597.

- (b) Secret conveyances, diminishing the property rights that were expected to be acquired by the marriage is a fraud in equity, for which such relief as is possible then will be given, by giving an equivalent out of remaining property. But if discovered before marriage, consummating the marriage waives the right to complain.

- (c) Obtaining the property by one, of the other, as a gift or for an inadequate consideration, and then refusing to complete the marriage, is a strong if not conclusive badge of fraud. Cooley, 607.

(3) Parent and child.

- (a) Because of the parental influence and authority exercised during ~~authority~~ minority, all dealings between such parent and child soon after

The following information was obtained from the records of the Federal Bureau of Investigation:

[The rest of the document contains extremely faint and mostly illegible text.]

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its program. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its program.

after arriving at minority whereby the child makes voluntary conveyances, or conveyances for an inadequate consideration, will be jealously scrutinized and set aside if they cannot be shown to be spontaneous acts of the child, after he knows fully his own rights.

- (b) Then parents become old and infirm, and the child's mind is the controlling one, the same rule is applied for the protection of the parent. Cooley p. 602.
- (4) So too gifts or conveyances upon inadequate considerations by those living in illegal sexual relations will be set aside unless shown to have been made with free volition. Cooley, 603.
- (5) Dealing with persons known to have weak intellect, requires the utmost good faith, and gifts made, due to any fraud or undue means will be set aside. ex A like rule applies to dealings with intoxicated persons. Cooley 603-4.

B. The principal Conventional or Contract relations are those of

*officer* } 1. ~~Corporator,~~ "corporation or creditor and corporate *share*  
*holders* } ~~officer, holders and creditors.~~

- (1) The corporation itself, as the representative of the collective interests of the shareholders and creditors. And generally for wrongs that affect all alike only the corporation can sue. Wrongs of this kind would be exceeding corporate powers; embezzling the funds; loss of funds due to negligence; or any damage to all resulting from a failure to perform their official duties. If the corporation will not, or can not sue, for redress, an individual shareholder can sue on behalf of himself and all others to redress the wrong, after exhausting all remedies within the corporation that are possible.

- (2) The shareholders individually, such as
  - 1. To keep within corporate powers.
  - 2. To give correct information, when called for.
  - 3. To allow inspection of books;
  - 4. To transfer shares, or register the transfer;
  - 5. To pay dividends duly declared, and in some cases declare dividends.

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 01-21-2001 BY 60322 UCBAW/STP  
REASON: 60322 UCBAW/STP

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines.

Appointed as a W. S. W. agent of the U. S. Department of the Interior (6)  
of the U. S. Department of the Interior, U. S. Department of the Interior  
of the U. S. Department of the Interior, U. S. Department of the Interior  
of the U. S. Department of the Interior, U. S. Department of the Interior

1. To establish a system of records for the purpose of maintaining a complete and accurate record of the activities of the Commission.

1. The Commission has no jurisdiction over the matter.  
2. The Commission has no jurisdiction over the matter.

[illegible]

1. The first step is to identify the problem. This involves understanding the situation and the goals that need to be achieved. It is important to gather all relevant information and to define the problem clearly.

1. The first part of the document is a letter from the author to the reader, explaining the purpose of the work and the method of its preparation.

6. Take no advantage of his position to the prejudice of his associates.
7. To give no advantage to one associate over another.
8. To exercise due care and faithfulness in the discharge of his official duties.

A court of equity will enjoin the 1st, allow an action of damages for the violation of 2,3,4, 5, and 8 if damages result, and also compel by mandamus the performance of 3 and 4.

Wrongs which violate 6, are accomplished usually by officers making purchases for the corporation, and charging it more than the cost; or selling the corporate property in such way as not to obtain full value, and purchasing it themselves. In either of these cases a wrong is done, and the transaction will be set aside; so to some cases hold that sales by or to the corporation to or by its officers will be set aside, though there was in fact no fraud in the transaction,--because the law will not allow the trustee to place his interest in opposition to that of the cestui qui trust.

The officers and shareholders, as individuals, can deal with one another.

Under 7, the shareholder obtaining the undue advantage will be required to surrender it for the benefit of all.

- (3) To Creditors,--the corporate officers, for the protection of the rights of creditors owe them the duty, when the corporation becomes insolvent to use reasonable care and diligence to preserve the property for their security so far as possible,--the relation then becomes similar to that of trustee, and beneficiary.

The officers may also become liable to dealers with a corporation for exceeding their powers upon an implied warranty of authority, and they also may make themselves liable for their wrongful acts injuring third parties.  
Cooley, 604-7.

2. Trustees and cestui que trust: This is a relation that requires the utmost good faith, and is a relation peculiarly protected by courts of equity. In fact the rights





of the beneficiary were not originally recognized in a court of law, but only in equity. The relation is created by a conveyance of property by A. to B. to hold for the use, or benefit of, or in trust for C. In which case the legal title and possession are in B., while the beneficial interest is in C.,--there is no contract relation enforceable in law between A. and C., or B. and C., but only between A. and B. If therefore B. failed to perform the trust, it was a violation of the contract with A. of which he only could complain in law; C. only could complain in Equity,--the court here either enjoining the wrong, or removing the offending trustee. Particular rules are,

- (1) A purchase by the trustee of a part or all of the trust property will be set aside upon the application of the beneficiary,--for the reason that the purchase is in law a sale by the trustee to himself,--he having the legal title already,--and this places his own interest in conflict with that of the beneficiary. This is true though there was no fraud in fact, and though the sale was otherwise fair and for a full price. However, the beneficiary that is competent to contract, may with full knowledge of his rights, by express agreement, or long acquiescence, ratify the sale.
  - (2) The same rule applies to sales by the trustee of his own property to himself as trustee, for the use of the trust estate.
  - (3) The same rules apply to executors, administrators, guardians, assignees in bankruptcy, partners, and agents,--although many or most of these were remedied in courts of law as well as equity.
- Cooley p. 612-15.

### 3. Principal and Agent.

- (1) Courts of law had jurisdiction of this relation, because it was one of contract. The duties of the agent however, are similar to those of a trustee.
- (2) The principal owes the agent the duty to warn him of perils and use care for his protection, and pay for services rendered in accordance with the contract.
- (3) The agent owes the principal the duty to use care and diligence to perform the services agreed to be performed.
- (4) The same rules apply to partners when acting for the partnership. Cooley, 615-6.

[illegible]

The following information was obtained from the records of the  
 Department of the Interior, Bureau of Land Management, at  
 Washington, D. C., on July 1, 1964.  
 The records of the Bureau of Land Management show that the  
 following lands are owned by the United States Government:  
 1. 100.00 acres of land in the County of [redacted] State of [redacted]  
 2. 100.00 acres of land in the County of [redacted] State of [redacted]  
 3. 100.00 acres of land in the County of [redacted] State of [redacted]  
 4. 100.00 acres of land in the County of [redacted] State of [redacted]  
 5. 100.00 acres of land in the County of [redacted] State of [redacted]  
 6. 100.00 acres of land in the County of [redacted] State of [redacted]  
 7. 100.00 acres of land in the County of [redacted] State of [redacted]  
 8. 100.00 acres of land in the County of [redacted] State of [redacted]  
 9. 100.00 acres of land in the County of [redacted] State of [redacted]  
 10. 100.00 acres of land in the County of [redacted] State of [redacted]

... .. ( )

... ..

4. Attorney and client. This is a relation of confidence and trust by the client in the skill and integrity of the attorney.
- (1) So if the attorney by unwarrantable acts obtain gifts or conveyances of property from the client, they will be set aside.
  - (2) So too, where the attorney by unwarrantable acts renders himself liable to third parties, and exacts indemnity from the client,--it will be set aside.
  - (3) The attorney's lips are sealed by the law as to matters given him in confidence by the client, and if disclosed without his consent, to the damage of the client the attorney is liable.
  - (4) So too, he cannot serve two masters, by acting as counsel or attorney for both parties to an adverse litigation; the one that can show resulting damage can hold the attorney for it, if due to his acts or omissions. Cooley 616-7.
5. Scriveners, or those who draw up legal documents for others, if interested themselves must not only act in good faith, but must make sure that his interest does not mislead his judgment to the damage of the other party; he will be estopped from claiming an advantage so obtained. The rule is frequently applied to insurance companies upon contracts made by their agents Cooley, 619.
6. Physicians and Clergymen.
- (1) At common law confidential communications in these relations were not protected as in case of attorney and client, and could be called for, and required to be divulged, upon the witness stand; and if divulged elsewhere, no action for damages could be maintained.
  - (2) Statutes have quite frequently changed this rule, so far as not to require them to be given in evidence.
  - (3) The law also recognizes the influence that physicians and clergymen acquire over their patients and parishioners, due to the confidence reposed, and the opportunity, especially in cases of last illness, to unduly exert it for their special advantage at that time. Hence all transactions in the way of voluntary conveyances and gifts under such circumstances will be set aside unless it can be clearly shown that no advantage was taken.



## CHAPTER XVIII.

Master and Servant.I. Definitions:

Employer (in the sense used here for convenience), is one who prescribes an end or final result to be accomplished, through the aid of others, without retaining the power to control the means of carrying it out.

Master, a master is one who not only prescribes the end or final result of a certain undertaking, but also retains the power of controlling it by directing the means of carrying it out. One who controls the work, or who retains the power or right to control it

Independent Contractor, is one who undertakes to produce a certain result for an employer, the means and manner of producing that result being left within his own control, or right of control.

The term applies to all persons following regular independent employment, who offer their services to the public, and accept employment, using their own means of performance. Cooley, 347.

Servant is one bound to obey the master's directions if, and when, they are communicated to him. One who for the time being places himself in a position of subordination to another in carrying out the business of the latter; this includes a child employed about the parent's affairs, a mere volunteer, an agent, either general or special, an officer of a private corporation, or of a public corporation in the management of its property, but not the legislative, judicial, executive or police officers generally in the exercise of their public functions. Cooley, p. 622.

The servant of one master may, for a certain time and purpose become the servant of another master even though the former is to pay him.

II. Rules of liability.A. Of the Master.

1. To third persons injured by acts of servant;

General rule. The master is responsible for the wrongful acts of his servant committed while on the master's business and within the apparent scope of his authority. The rule extends to include negligence, fraudulent, deceitful, wilful, malicious and even criminal acts, when done in the master's business and within the scope of servant's



authority, though done in neglect, excess, or disregard of the master's instructions, without his knowledge, and as the result of a mistake of fact or law on the part of the servant

Business includes everything the servant may do for the master with his express or implied sanction. Scope of authority is not determined by instructions, or by the terms of the contract, but by whatever may be reasonably considered as incident to or sanctioned by the customs of the occupation in which the servant is at the time employed;--the apparent scope of authority controls, that is, that which the principal or master has apparently held the servant out as possessing.

If the servant steps entirely outside of this authority, and undertakes to do something for himself, the master is not liable for a resulting injury.

Reasons: The following have been suggested as reasons for the rule.

1. What one does by another he does himself. This would seem to apply only to expressly authorized acts
2. The master ought to be careful in choosing servants. If this was the true reason, it would be a defense for master to show that he had exercised due care in selecting his servants; but that will not excuse the master.
3. "Not because my servant is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others," seems to be more nearly the true reason for the rule.

Several particular cases or classes of cases may arise, in which the servant's act may be due to:

- (a) Specific orders, carefully carried out.
- (b) Negligence
- (c) Excess or Mistake in performance.
- (d) Wilful and deliberate wrong.

- (a) Specific orders. Rule; For injuries resulting from specific orders the master is liable not only for what he has expressly directed, but also for the natural and probable consequences of carrying them out, even if done with due care so far as servant is concerned; the same rule applies if done by an





independent contractor.

(b) Negligence. Rule: For injuries resulting from negligence of the servant, a master is liable if the servant was, at the time on his master's business, and that is a question of fact. If servant was engaged in some pursuit of his own, the master is not liable,--there must, however, be not only deviation but total departure from the master's business to excuse the master.

(c) Excess or Mistake. Rule: The master is liable if the servant intended or undertook to do an act for the master of the class which he was authorized to do, and which if done properly, or under the circumstances supposed by the servant to exist, would have been lawful.

Reason,-- When a person puts another in his place to do a class of acts in his absence, he necessarily leaves the servant to determine according to the circumstances that arise, when and how the act should be done.

#### Cases.

Excessive force frequently occurs in the removal of passengers from vehicles by servants of common carriers, etc.

Mistakes frequently occur in making arrests of persons suspected of defrauding railroad companies, ect. In such cases to make the master liable it must be shown,

- (1) That the arrest would have been justifiable if the offense had really been committed by the party accused.
- (2) That such arrest was within the scope of the employment of the servant who made it.

If the act is wholly outside of authority, and is such a thing as the master himself would have no authority to do, even if the facts were such as the servant thought them to be, the master is not liable.

(d) Wilful and intentional acts.

The master is liable not only for such acts as were directed, but also such as he was suffered or allowed to do, within the real or apparent scope of the master's business. In this connection the motive of the servant is important in ascertaining the fact as to whether he was in fact acting for

...the return of the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...

1. The first of these is the fact that the  
2. second of these is the fact that the  
3. third of these is the fact that the  
4. fourth of these is the fact that the  
5. fifth of these is the fact that the  
6. sixth of these is the fact that the  
7. seventh of these is the fact that the  
8. eighth of these is the fact that the  
9. ninth of these is the fact that the  
10. tenth of these is the fact that the

[illegible]

a. admission to the club is not open to children  
 b. admission to the club is not open to children  
 c. admission to the club is not open to children

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. total amount paid

1. The first of these is the fact that the  
2. The second is the fact that the  
3. The third is the fact that the  
4. The fourth is the fact that the  
5. The fifth is the fact that the  
6. The sixth is the fact that the  
7. The seventh is the fact that the  
8. The eighth is the fact that the  
9. The ninth is the fact that the  
10. The tenth is the fact that the

the master, or only for himself,--but the motive is not conclusive. The real test is, whether "that which he did was something his employment contemplated, something which if he should do it lawfully, he might do in the employer's name,"--and the circumstances of this employment called forth the specific wrongful act. Cooley, 626-631.

(e) Disobedience. "It is immaterial to the master's liability that the servant was at the time disobeying orders, neglecting prescribed precautions, or failing to obey directions,--for it is the master's duty to see that they are in fact obeyed,-- else he becomes liable for resulting injury." Cooley 632.

(f) Criminal Liability: The master may in some cases be criminally liable; this can occur when certain Statutes regulating police matters, impose penalties regardless of intent, such as relate to the sale of adulterated foods, liquors, etc., and engaging in business without a license, etc.

Sub-agents. The above rules extend to include acts done by sub-agents or sub-servants in the same manner as those of servants or agents, if they were employed by agents or servants under authority, either express, or implied, or arising from custom or necessity.

Partners. Also a partnership is liable for acts of partners done in the course of the firm's business and within the scope of the partner's authority.

## 2. Master's Liability to Servants:

The party injured may be another servant of the same master, in which case rules different from those above given apply; to understand these it is necessary to consider the

Duties of the master toward his servants. These are:

1. To use reasonable, ordinary care to furnish safe and suitable machinery, implements, appliances, materials, and place to carry on the work. The master is not an insurer in these matters, but must use such care, precaution and foresight as a reasonable prudent man would exercise.
2. To use reasonable care in procuring and retaining competent, skillful and (perhaps) a sufficient number of servants to execute the work properly.

Note. These duties are personal to the master and



and cannot be delegated to another so as to relieve him from liability. If they are in fact delegated, the master is liable for the defaults of the person to whom they are delegated. Cooley p. 662.

#### Rules of Liability:

The master is therefore liable to his servants, for his own negligence in

- (1) Premises. Arising from dangerous premises of which the servant was not aware, but which the master knew or by reasonable care could have known. Cooley p. 648. (1st rule).
- (2) Tools. Arising from latent dangers in tools, machinery and materials, known or negligently unknown, to the master, but unknown to the servant. Cooley p. 657, (4th rule).
- (3) Repairs. For failing to make promised repairs within a reasonable time after promise is made. Cooley 661 (6th rule).
- (4) Servants. For employing, or retaining after notice of unfitness, incompetent servants, and in some jurisdictions failing to employ a sufficient number of servants. (in many jurisdictions this rule is not favored). Cooley 659 (5th rule).
- (5) Inexperienced servants; In failing to warn, and make clear to, inexperienced servants, the perils of the service. Cooley 652 (rule 2)
- (6) Service not contemplated. For injuries suffered by servants when temporarily called on by master to perform unfamiliar duties not in the usual course of his employment, without giving such servant full information as to risks attending such service. Cooley 655.

(7) For injury arising from his own act combined with that of a fellow servant.

(8) For injuries arising in other business.

#### 1. General rule or principle.

*Rules on non-liability.*

The master is not liable to his servant for the risks that are incident to the business and which the servant knows as well as the master; the servant is supposed to consider these risks in fixing upon the price of his services. Among the risks incident to the business which the servant assumes is the risk of injury from other servants of same master. Cooley, 634.

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

11113

2. Liability for injury to servant by a fellow servant.

1. Common law rule: A master is not liable to his servants for injuries arising from the wrongful act or negligence of a fellow servant done in the course of their common employment, provided the master had used due care in selecting or retaining the servant whose act caused the injury.

Explanation:

A fellow servant by the common law is one engaged in the same common pursuit, the same general kind of employment with other servants of whatever grade or degree, and under the same general control or master.

- (a) They must be under the same general control or master.
- (b) In the same common employment,--not necessarily engaged in doing the same kind of work, but engaged in attaining or furthering the same general object, so that the risk of injury by one is so much a natural and necessary consequence of the employment that the other is presumed to have considered it in the wages asked.
- (c) The grade is immaterial,--The injured servant may be of an inferior grade to that of the one causing the injury, and even under his control, so long as the offending servant is not at the time engaged in performing the personal duties of the master, above designated.
- (d) The department of the work is immaterial also, so long as it is a department or division of the same general employment.

2. Other views: ~~A department or division of the same general employment.~~

The above are the generally accepted rules, but by statutes in England and many States, and by Courts in several States, they have been considerably modified. These modifications usually are as follows, either one or both:

- (a) Superior servant rule.-- In some states a rule obtains that every superior servant having control of others is a vice principal, and the master is responsible to every inferior servant under control of such superior, for injuries arising from the wrongful and negligent acts of such superiors; but if such

5

[illegible][illegible]

DATE: 07/06/2019 TIME: 11:08 AM PAGE: 1 OF 1

1. The first of these is the fact that the
 2.
 3.
 4.
 5.
 6.
 7.
 8.
 9.
 10.
 11.
 12.
 13.
 14.
 15.
 16.
 17.
 18.
 19.
 20.
 21.
 22.
 23.
 24.
 25.
 26.
 27.
 28.
 29.
 30.
 31.
 32.
 33.
 34.
 35.
 36.
 37.
 38.
 39.
 40.
 41.
 42.
 43.
 44.
 45.
 46.
 47.
 48.
 49.
 50.
 51.
 52.
 53.
 54.
 55.
 56.
 57.
 58.
 59.
 60.
 61.
 62.
 63.
 64.
 65.
 66.
 67.
 68.
 69.
 70.
 71.
 72.
 73.
 74.
 75.
 76.
 77.
 78.
 79.
 80.
 81.
 82.
 83.
 84.
 85.
 86.
 87.
 88.
 89.
 90.
 91.
 92.
 93.
 94.
 95.
 96.
 97.
 98.
 99.
 100.
 101.
 102.
 103.
 104.
 105.
 106.
 107.
 108.
 109.
 110.
 111.
 112.
 113.
 114.
 115.
 116.
 117.
 118.
 119.
 120.
 121.
 122.
 123.
 124.
 125.
 126.
 127.
 128.
 129.
 130.
 131.
 132.
 133.
 134.
 135.
 136.
 137.
 138.
 139.
 140.
 141.
 142.
 143.
 144.
 145.
 146.
 147.
 148.
 149.
 150.
 151.
 152.
 153.
 154.
 155.
 156.
 157.
 158.
 159.
 160.
 161.
 162.
 163.
 164.
 165.
 166.
 167.
 168.
 169.
 170.
 171.
 172.
 173.
 174.
 175.
 176.
 177.
 178.
 179.
 180.
 181.
 182.
 183.
 184.
 185.
 186.
 187.
 188.
 189.
 190.
 191.
 192.
 193.
 194.
 195.
 196.
 197.
 198.
 199.
 200.
 201.
 202.
 203.
 204.
 205.
 206.
 207.
 208.
 209.
 210.
 211.
 212.
 213.
 214.
 215.
 216.
 217.
 218.
 219.
 220.
 221.
 222.
 223.
 224.
 225.
 226.
 227.
 228.
 229.
 230.
 231.
 232.
 233.
 234.
 235.
 236.
 237.
 238.
 239.
 240.
 241.
 242.
 243.
 244.
 245.
 246.
 247.
 248.
 249.
 250.
 251.
 252.
 253.
 254.
 255.
 256.
 257.
 258.
 259.
 260.
 261.
 262.
 263.
 264.
 265.
 266.
 267.
 268.
 269.
 270.
 271.
 272.
 273.
 274.
 275.
 276.
 277.
 278.
 279.
 280.
 281.
 282.
 283.
 284.
 285.
 286.
 287.
 288.
 289.
 290.
 291.
 292.
 293.
 294.
 295.
 296.
 297.
 298.
 299.
 300.
 301.
 302.
 303.
 304.
 305.
 306.
 307.
 308.
 309.
 310.
 311.
 312.
 313.
 314.
 315.
 316.
 317.
 318.
 319.
 320.
 321.
 322.
 323.
 324.
 325.
 326.
 327.
 328.
 329.
 330.
 331.
 332.
 333.
 334.
 335.
 336.
 337.
 338.
 339.
 340.
 341.
 342.
 343.
 344.
 345.
 346.
 347.
 348.
 349.
 350.
 351.
 352.
 353.
 354.
 355.
 356.
 357.
 358.
 359.
 360.
 361.
 362.
 363.
 364.
 365.
 366.
 367.
 368.
 369.
 370.
 371.
 372.
 373.
 374.
 375.
 376.
 377.
 378.
 379.
 380.
 381.
 382.
 383.
 384.
 385.
 386.
 387.
 388.
 389.
 390.
 391.
 392.
 393.
 394.
 395.
 396.
 397.
 398.
 399.
 400.
 401.
 402.
 403.
 404.
 405.
 406.
 407.
 408.
 409.
 410.
 411.
 412.
 413.
 414.
 415.
 416.
 417.
 418.
 419.
 420.
 421.
 422.
 423.
 424.
 425.
 426.
 427.
 428.
 429.
 430.
 431.
 432.
 433.
 434.
 435.
 436.
 437.
 438.
 439.
 440.
 441.
 442.
 443.
 444.
 445.
 446.
 447.
 448.
 449.
 450.
 451.
 452.
 453.
 454.
 455.
 456.
 457.
 458.
 459.
 460.
 461.
 462.
 463.
 464.
 465.
 466.
 467.
 468.
 469.
 470.
 471.
 472.
 473.
 474.
 475.
 476.
 477.
 478.
 479.
 480.
 481.
 482.
 483.
 484.
 485.
 486.
 487.
 488.
 489.
 490.
 491.
 492.
 493.
 494.
 495.
 496.
 497.
 498.
 499.
 500.
 501.
 502.
 503.
 504.
 505.
 506.
 507.
 508.
 509.
 510.
 511.
 512.
 513.
 514.
 515.
 516.
 517.
 518.
 519.
 520.
 521.
 522.
 523.
 524.
 525.
 526.
 527.
 528.
 529.
 530.
 531.
 532.
 533.
 534.
 535.
 536.
 537.
 538.
 539.
 540.
 541.
 542.
 543.
 544.
 545.
 546.
 547.
 548.
 549.
 550.
 551.
 552.
 553.
 554.
 555.
 556.
 557.
 558.
 559.
 560.
 561.
 562.
 563.
 564.
 565.
 566.
 567.
 568.
 569.
 570.
 571.
 572.
 573.
 574.
 575.
 576.
 577.
 578.
 579.
 580.
 581.
 582.
 583.
 584.
 585.
 586.
 587.
 588.
 589.
 590.
 591.
 592.
 593.
 594.
 595.
 596.
 597.
 598.
 599.

1. The Board of Directors of the Corporation shall have the right to elect and remove the President, Vice President, Secretary and Treasurer of the Corporation, and to elect and remove any other officers or directors of the Corporation.

1. The first step is to identify the specific area of the body that is affected by the condition. This can be done by observing the location of the pain or discomfort, as well as any visible changes in the skin or tissue.

1. The first of these is the fact that the  
2. Government has been unable to secure the  
3. necessary funds to carry out its policy.  
4. This is due to the fact that the  
5. Government has been unable to secure the  
6. necessary funds to carry out its policy.  
7. This is due to the fact that the  
8. Government has been unable to secure the  
9. necessary funds to carry out its policy.  
10. This is due to the fact that the  
11. Government has been unable to secure the  
12. necessary funds to carry out its policy.



superior servant is injured by an inferior servant's act, the master is not liable.

(This rule is favored by many of the courts of the Southern and Western States, by many text writers, and many states have made it a Statutory rule).

- (b) Departmental rule,-- In other States it is held a laborer in one department of a great enterprise is not a fellow servant with a laborer in another and separate department of the same enterprise,--(e. g. The train department of the road dept. of a R. R.).

(This rule is applied in Georgia, Kentucky, Tennessee, and Illinois, and apparently favored by the U. S. Courts).

- (c) Combination rule,-- In other states, a combination of these rules is applied,--that is, a master is liable to an inferior servant injured either by a superior servant in that department or by any servant in any other department.

Volunteers: Those having or representing no interest in the work and are not employed by proper authority, but volunteer of their own motion, or at the request of one having no authority to employ, are considered fellow servants with the others engaged in the work, and cannot recover for damages done in the service by the fault of other servants.

If, however, the person volunteering has an interest of his own or represents the interest of another person, and assists for the purpose of aiding or advancing it he is not then a fellow servant.

## B. Liability of the Servant.

### 1. To the master.

- (a) In tort, the servant is liable to the master for any tort committed against the master that is not simply a breach of the contract of service. e. g. conversion of property left or put in his charge, etc.

- (b) In contract. The servant is liable to master for breach of his contract of service, and also for the wrongful or negligent acts done by the servant to third persons to whom the master is liable unless done under specific orders of the master.



## 2. To third persons.

General rule. An agent or servant is personally responsible to third parties for doing something which he ought not to have done, but not for having done something which by the terms of his employment alone he ought to have done; in the latter case the servant is liable to the master only, for these duties are not fixed by law, but only by the contract with the master, for whom alone he has promised to perform them. But for the servant's misfeasance or malfeasance, or negligence, or unlawful acts in doing his master's service he is liable to persons injured,--for he, in common with all others, is required to do what he has a right to do, with due respect to the rights of others.

That the servant was obeying the master's directions, or that he received no advantage, or indeed acted in good faith believing the master had a right to do what was done, does not excuse the servant from liability,--but he may be entitled to indemnity from master.

3. To fellow servants.--one servant who injures by his tortious act a fellow servant is liable to him, as any one to a person he hurts. Hale § 74.

Employer and independent contractor.

1. Liability of employer.

(a) General rule.: The employer, or person simply contracting for a certain result, leaving the control of the means to another as an independent contractor, is not liable to third parties or to such contractor's servants for the wrongful or negligent acts of such independent contractor or of his servants.

(b) Exceptions.

(1) Result,--if the result of carefully carrying out the contract by the independent contractor is to injure a third party, the employer is liable, because it is done for him by his orders. Cooley, 646.

(2) Obviously dangerous,-- If the thing contracted for is obviously dangerous, a failure to see that proper precautions are taken to prevent damage, leaves the employer liable. Cooley 646.

[illegible]

1. The first step is to identify the problem. In this case, the problem is that the system is not working properly.

1. The first of these is the fact that the  
2. second of these is the fact that the  
3. third of these is the fact that the  
4. fourth of these is the fact that the  
5. fifth of these is the fact that the

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator, who is usually a member of the research team. The investigator will identify the problem by looking at the data and trying to find out what is going on.

- (3) Incompetent contractor,--an employer is liable if he negligently employs an incompetent contractor, for damage resulting therefrom. Cooley 646.
- (4) Personal neglect, of employer combining with that of the contractor, leaves the former liable also. Cooley 646.
- (5) Interference in management,--if employer personally interferes with contractor's workmen by directing them, and they obey his orders, or if he assumes and exercises control, he becomes liable. Hale § 63.
- (6) Nuisance,--Keeping, or allowing, a nuisance created or left by an independent contractor, on employee's premises, resulting in damage to another party, makes such employer liable. Cooley, 646.
- (7) Unlawful acts,--An employer cannot escape liability by hiring an independent contractor to commit unlawful acts for him. Hale § 63.
- (8) Statutory duties,--neither can one upon whom there rests a statutory duty escape liability by intrusting its performance to an independent contractor who fails. Hale § 63.

2. Liability of the independent contractor:

- (1) To third parties, and to his own servants, he stands as a master, and the rules of master's liability apply.
- (2) To his employer,--he stands as a servant, and the rules of the servant's liability to his master apply.

\*\*\*\*\*  
\*\*\*\*\*

[illegible]

## T O R T S.

Prof. Wilgus.

### COMBINATIONS OF PERSONS IN TORTIOUS ACTS.

I. Most torts are of such a nature that they may be committed by one person acting alone, or by two or more acting jointly. It is said there are two exceptions:

(a) That oral slander cannot be committed jointly,--but that the same words spoken at the same time, in the same place, of the same person, to the same persons, by two persons who have beforehand agreed to do so, make not one joint slander, but two separate slanders, for which each person guilty must be sued alone, and not jointly with the others. So also if one commands another to slander a third person, and he does so, the one commanding, and the one speaking the words, are not jointly, but only severally liable. No satisfactory reason for this rule seems to exist; It has been criticized, and it is believed it is passing away. In *Haney Mnfg. Co. v. Perkins*, ?? Mich., 1, on page 9, it is said by Judge Long: "The defendants were partners in business, and each of the partners is an agent of the partnership as an entirety, and, if in the course of that business he injures the business of another by slander, the partnership is liable therefor, just as it might be for any other tort by any other agent."

(b) It is also said that conspiracy is a tort which can be committed only by more than one,--or that one person can not conspire with himself. Generally, however, conspiring together to do a wrong is not a tort, until the wrong is so far done as to result in damage,--and if this is done through the act of a single person he is liable himself, whether in fact he conspired with other or not. In other words, the conspiracy is not a tort, but if it exists, only an aggravation of the wrongful act, and which if proved, allows others to be held liable, increases the area of available evidence, and furnishes a basis for exemplary damages.

II. With these exceptions, torts may be either several or joint, according to circumstances; which they are, is sometimes difficult to tell.





(A). A joint liability may arise:

- (1) From a combination of proximate wrongful acts into one wrongful cause of the damage.
- (2) From a community or privity of interest in the property or thing causing the damage.
- (3) From certain relationships.

Under the first of these are:

(a) Concert of action,--where two or more voluntarily engage in the same wrongful act.

(b) Concurring wrongful acts, resulting in one proximate cause of an injury, like a collision of trains at a crossing of two railroads, due to the negligence of the servants of both roads.

(c) Inducing voluntary wrongful acts of others, and using them as instruments of wrong-doing, whether intentionally, rashly or negligently, and whether the wrongful act induced is intentional, rash, or negligent, makes the parties joint tort-feasors.

\* The rule as to (a), (b), and (c), is sometimes stated:

"Several persons acting independently, but causing together a single injury are joint-tort-feasors, and may be sued either jointly or severally." 15 Am. & Eng. Enc. Prac. p. 558.

\* Another statement of the rule is: "There is a class of cases in which defendants are jointly and severally liable, although they are several and not joint-tort-feasors, As when there is no concert of action or unity of purpose, but the acts are concurrent as to place and time, and unite in setting in operation a single destructive and dangerous force which produces the injury."--Valparaiso v. Moffitt, 12 Ind. App. 250, 54 Am. St. R., 522; Slater v. Merserson, 64 N. Y., 136.

\* Another says that in order that "a union of wrong doers in one action should be possible, there must be some community in the wrong doing among the parties who are to be united as co-defendants; the injury in some sense must be their joint work." Pomeroy's Rem. & Rem. Rights, §308.

\* Under this comes also the rule that "persons whose separate and distinct acts culminate in producing a public nuisance which does special damage to a person, are jointly and severally liable."

Under the second of the above are:

- (a) Joint owners of property.
- (b) Landlord and tenant.
- (c) Partners.

The above information was obtained from the files of the Department of Social Services, New York City.

Very truly yours,  
John J. Gorman  
Director

1. The first of these is the fact that the
 2. second of these is the fact that the
 3. third of these is the fact that the
 4. fourth of these is the fact that the
 5. fifth of these is the fact that the
 6. sixth of these is the fact that the
 7. seventh of these is the fact that the
 8. eighth of these is the fact that the
 9. ninth of these is the fact that the
 10. tenth of these is the fact that the

1. The first step is to identify the problem. This involves understanding the situation and the goals that need to be achieved.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
DATE 09-18-2010 BY 60322 UCBAW/SJS/KSP

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

The general rule here is that those who stand in such a relation to property as to be charged with the duty of preventing it doing damage, are jointly liable for the damage it does; and it is said further, that in the case of joint-tenants they are only jointly, and not severally, liable. In the case of (b), the liability arises generally out of a nuisance, or from dangerous premises. As to (c) aside from the control of property alone, the joint liability arises mainly from the relation of agency existing among the partners. See, *Bishop v. Ely*, 9 Johns (N.Y.) 294; *Klander v. McGrath*, 35 Pa. St. 123; *Moreton v. Haidern*, 10 E. C. L. 316; *Davey v. Chamberlain*, 4 Esp. N. P. 229; *Milford v. Holbrook*, 9 Allen (Mass.) 17, 85 Am. Dec. 735.

Under the third above are,

- (a) Husband and wife.
- (b) Master and servant, or principal and agent,
- (c) Partners.

The law held that the tort of the wife, or the servant in performing his service, or the agent in executing his agency, or the partner in carrying on a partnership business, was the tort not only of that person, but the joint tort of the principal in the relation,--i. e. the husband, master, principal, or firm,--and they might be joined.

In the cases of (b) and (c) it is said there were two exceptions: They were not jointly liable if the acts were such that the forms of action against the parties must be different; e. g. if the form of action against the servant must be trespass, and the act against the principal must be case, then they could not be joined. Or if the servants or agents act was a mere non-feasance, or failure to perform his duty of faithfulness to his principal, and was not negligence, misfeasance or malfeasance toward the person hurt, the servant was not a tort-feasor at all, and so could not be joined with the master.

(B). A joint liability does not arise when the persons act severally, and independently, each causing a separate and distinct injury, even though afterward the consequences unite in such a way as to make it difficult or impossible to apportion them; such persons cannot be sued jointly, but must be sued severally.

III. Joint tort feors as explained in A. above are jointly, or severally,--one or more, or any part, or all of them liable for the whole damage.



IV. Among joint-feasors who are intentionally or negligently wrong-doers,--one of whom has paid for the damage by all, there can be no contribution enforced through the courts.

V. Contribution is allowed, and may be enforced, when one joint-tort feasor has paid all the damage resulting from acts done by several in good faith in an attempt to enforce what were considered justifiable claims, or when the parties are charged only constructively as wrong-doers, or when as between the parties themselves they cannot be considered as wrong-doers.

VI. Indemnity is allowed when one has without fault upon his part, been held constructively for the tort of another, or has been induced innocently to act in such a way as to invade another's right, for which he has had to pay.

#### PROBLEMS AS TO JOINT TORT-FEASORS.

1. D1, D2, and D3, owned in severalty three lots adjoining; on each lot was a brick store with brick partition walls, and a continuous front wall next to the side walk. All the three stores were destroyed by fire, but the front wall was left standing. It was known to be dangerous, and finally fell on P. and hurt him. The part of the wall opposite the lot of D1, did the injury to P. who sued them jointly. Were they all liable to P? *yes.*  
Why? *124 N. Y. 319 - 1891.*

2. D1, and D2 together assault P. who sues them jointly. The jury found both guilty, and assess the damages against D1 at \$125, and against D2 at 50 cents, and judgment for these amounts was given accordingly. They, the defendants, brought error? Should the judgment be reversed? *yes* Why?

3. D1 and D2 enter P's land and pull down his shop, without authority. P. sues them jointly. The jury find both guilty and assess the damages against D1 at \$75.00 and against D2 at \$2.00. P. elects to take judgment for \$75.00 against both and remits the smaller amount against D2. Judgment is rendered against both for \$75.00, and D1 and D2 claim this was error. Was it? Why? *No.*

*14. T.W. 9 Pickering (Mass.) 550*

1999

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The investigator must first identify the problem and then determine the scope of the study. The next step is to design the study. This involves determining the methods to be used and the data to be collected. The third step is to collect the data. This is done by the investigator who is responsible for the study. The fourth step is to analyze the data. This involves determining the results of the study and the conclusions that can be drawn from the data. The final step is to report the results of the study. This is done by the investigator who is responsible for the study.

...the ... ..  
... ..  
... ..  
... ..

...the ... ..

...of all ... ..

11. The above information is being furnished to you for your information only. It is not intended to be used for any other purpose. The information is being furnished to you for your information only. It is not intended to be used for any other purpose. The information is being furnished to you for your information only. It is not intended to be used for any other purpose.

1. The first of these is the fact that the  
2. Commission has not yet received any information  
3. from the Government of the Republic of the  
4. Congo regarding the situation in the  
5. country. It is therefore impossible to  
6. make any statement on the subject at this  
7. time.

4. D1 and D2 together assault P. who sues them jointly. The jury awards P. \$700 damages and assess the share of D1 at \$150, and that of D2 at \$550. P. remits the share of D1, and dismisses the action as to him. D2 objected to the verdict when rendered, and asked that it be set aside and a new trial granted. The Court did this, and then P. appealed claiming the lower Court erred in setting aside the verdict. Was there error? *yes. Why?*  
*W. & W. 44 Minn. 237 - 1890.*

5. D1 and D2 are neighbors, and both own dogs known to be likely to kill sheep. The dogs get together one night and together kill ten of P's sheep. P. sues D1 and D2 jointly. Are they so liable? *No. Why?* *modification*  
*A. & T. 2 Conn 206 - 1817*  
*25 Ohio 218 - 1877*  
*2. V. H. 87 Tenn 148 - 1889*

6. D1 and D2 are railroad companies. P. is a passenger on the railroad of D1. A collision occurred due to the negligence of the servants of both D1 and D2, which injures P., who sues them jointly. D2 moves to dismiss as to itself; this was denied, and the court charged that recovery could be had against both. Was this error? *No. Why?*  
*to be overruled (N. Y.) 382 - 1857*

7. P. was arrested by an officer on nine writs in favor of D. and eight other creditors; they were all served at the same time, by the one arrest of P. He was confined in jail for more than a year, when he was discharged on a habeas corpus for defects in the affidavits upon which the writs were issued. D. offered to prove that the other creditors had given up their claims against P. in consideration of him not suing them for false imprisonment. This was excluded, a verdict was given for P., and D. excepted. Was there error? *yes. Why?*  
*8. D. 5 Allen (Mass) 29 - 1862*

8. D1, D2, D3, and D4 were the owners of mines along a stream supplying P's mill. Refuse from the mines of each are thrown into the stream, until it accumulates to such an extent in the bottom of the stream at the dam of P. at the mill, as to make it useless. P. sues D1 for the whole damage, and the court below charged the jury that D1 could be so held. Was there error? *yes. Why?*  
*57 Penna. St. 142*

9. D1, D2, and D3 are farmers through whose farms a stream of water flows; they acting separately, maintain ditches whereby the water from their farms is collected in large and unnatural quantities, and different from the natural flow is turned into the stream in such a manner and amount as to damage P. a lower land owner. He sues them jointly. Are they liable? *No. Why?*

*Miller v Highland Ditch Co. 57 Calif. 430.*

*57 Cal. 56*

[illegible][illegible]



10. P. ships his goods on B's ship and through the negligence of the captains of B's ship and of D's ship there is a collision, whereby P's goods are lost. P. sues D., who pleads in abatement that the damage was caused by the joint negligence of B. and D. To this plea P. demurred. Should the demurrer be sustained or overruled? Why?

*Sustained* M. v T. 5 Turn Reports 679 - 1794.

11. P. was riding on the street car of B. Company, and was injured by a collision of the car with a car of D. Co., the collision being due to the negligence of the servants of both companies. P. sues both. Is he entitled to judgment against both? Suppose he releases all claim against B. Company for a consideration paid to him by that Company. What effect if any does that have upon D's liability? Why?

*Release of one releases both* 39 Minn. 328. 125 Penna 397.

12. Suppose that in No. 11, the collision was due wholly to the negligence of X, B's Motor-man, and Y, D's motor-man. What would be P's rights against B., D., X, and Y? If judgment was obtained against B. and paid by B. what would be the rights of B. Co. against D., or X, or Y? Why? Or if P. obtained judgment against X, who paid it, what would be X's rights against B., D., or Y? Why? *X no right against the rest.*

*M. v A. Law Repts 13 Appealed Case 1 - 1888*  
*P. v H. 116 N. S. 366 - Contribution 16 Am. St. Rept. 350*

13. D1 owns a wharf, which he leased to D2. It was out of repair when D2 took possession, and he allowed it to so continue in a dangerous condition, so that P., while careful himself and lawfully upon the wharf was seriously injured by falling through it. He sued D2 for the injury, and before he obtained judgment against D2, he brings another suit for the same injury against D1, who pleads the pendency of the suit against D2, in abatement of the action against himself. P. demurs to this plea. Should the demurrer be sustained or overruled? Why?

*Sustained* State v Boise 72 Maryland 140 - 1890.

14. D1 and D2, and X., Y., and Z., were joint tenants in the ownership of a piece of land, upon which they maintained a mill-dam across a river, which had the effect of throwing back the water upon the land of P. to his damage, and for which he sued D1 and D2, who pleaded in abatement, for the non joinder of the other joint tenants. P. objected to the sufficiency of the plea, but the lower court gave judgment for D1 and D2. Was this error? Why? *L. v M. 14 Johnson (N. Y.) 426 - 1817*

15. D1., D2., D3., and D4. were proprietors of a stage-coach for the conveyance of passengers from B. to C.; they received P. as a passenger between these places, for a fixed sum,

01/12/1971

1. The first part of the report is a general introduction to the project. It describes the objectives of the study and the methods used to collect and analyze the data. The second part of the report is a detailed description of the results of the study. It includes a discussion of the findings and their implications for the field of research.

2. The second part of the report is a detailed description of the results of the study. It includes a discussion of the findings and their implications for the field of research. The third part of the report is a conclusion and a summary of the main findings. It also includes a list of references and a list of figures and tables.

3. The third part of the report is a conclusion and a summary of the main findings. It also includes a list of references and a list of figures and tables. The fourth part of the report is a list of references and a list of figures and tables. The fifth part of the report is a list of references and a list of figures and tables.

4. The fourth part of the report is a list of references and a list of figures and tables. The fifth part of the report is a list of references and a list of figures and tables. The sixth part of the report is a list of references and a list of figures and tables. The seventh part of the report is a list of references and a list of figures and tables.

5. The fifth part of the report is a list of references and a list of figures and tables. The sixth part of the report is a list of references and a list of figures and tables. The seventh part of the report is a list of references and a list of figures and tables. The eighth part of the report is a list of references and a list of figures and tables.

6. The sixth part of the report is a list of references and a list of figures and tables. The seventh part of the report is a list of references and a list of figures and tables. The eighth part of the report is a list of references and a list of figures and tables. The ninth part of the report is a list of references and a list of figures and tables.

to be carried safely. P's declaration alleged that the defendants conducted themselves so negligently in the performance of this service, through their servants, that the coach was upset and P. hurt. At the trial D1 and D2 were found not guilty, and D3 and D4 were found guilty, and the damages against them fixed at \$250, for which judgment was given. Was this error? Why? *complain.*  
*Ans. Wood 3 Broderick + Ringham 54 - 1821 Yes.*

16. P. brought an action of trespass against D. for breaking into his house. D. answered, admitting the trespass, but stating further that the same had been committed jointly by himself and one M., and that afterward, P. in writing released M. from actions of any kind whatever for this trespass. To this answer P. demurred. Should the demurrer be sustained or overruled? Why?  
*Overruled. Cooke v Gino 1 Hobart Reports p. 66 para 69 - 1614.*

17. P. sued D. in trespass for entering his house and carrying away his goods. D. pleaded that the trespass was committed by himself and S., and that P. had sued S., obtained judgment against him, and S. had paid this judgment. P. demurred. Should the demurrer be sustained or overruled? Why?  
*Overruled. Norton's Case Croker Eliz p. 30 - 1584.*

18. P. sued D. and five other persons in separate suits for a joint trespass, D. being the principal actor, and the others his servants. Before trial in either of the cases, the attorneys on both sides agreed that D. should be considered liable for the whole trespass, and in case a verdict was rendered against D. for the whole damage, and the Court should be of the opinion that P. would be entitled to his costs in the other cases, then these costs should be paid by them respectively, otherwise not. Judgment was had against D. for the whole amount, and was fully paid. The liability of the other defendants for costs was then submitted to the court. For whom should the decision be? Why?  
*L. B. Johnson (N.Y.) 290 - 1806.*

19. P. sued D. in detinue for a piano. D. pleaded that the act complained of was the joint act of himself and T., and that P. had recovered a judgment against T. in an action against T. for the same piano, and that the judgment was still in force. P. replied that the judgment was unsatisfied. D. demurred to the replication. Should the demurrer be sustained or overruled? Why?  
*Ans. Rule sustained. Contrary to Am. Rule. B. V. H. Law Reps 7 Conn. Press 547 - 187.*

20. D1 sued O., and in this suit, D2, the sheriff, attached certain property supposed to belong to O. P., however, claimed that the property belonged to him, whereupon D2, the sheriff, refused to proceed further with the attachment, unless D1 would

[illegible]

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

...the ... ..  
... ..  
... ..  
... ..  
... ..  
... ..  
... ..  
... ..  
... ..  
... ..

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation into the activities of the American Friends Service Committee in the Philippines.

give him a bond of indemnity. This was done, and D2 sold the property. P. then sued D2. He gave D1 notice, and D1 conducted the defense. Judgment was rendered against D2 for P. for \$6233, and D2 immediately paid \$830 thereon. P. then sued D1, and the court gave judgment for the same amount as before less the \$830 paid by D2. D1 claimed this was error because, (1) by giving bond he did not become a joint trespasser with D2; (2) P. had barred himself from suing D1, by suing D2, getting judgment and partial satisfaction from him; and (3) the judgment against D2 was not conclusive against D1. Was there error? *No.* Why? *Lovejoy v Murray 3 Wallace (U.S.) 1 - 1865*

21. P. sued D. in trespass, and it appeared from the record that he had also brought suit, and recovered judgment against Q. for the same trespass, in a separate action, but that he had never taken out execution upon this judgment. D. however, alleged "that since the bringing of the action in this case P. had received full satisfaction, by a judgment against Q., a joint trespasser, which judgment had been satisfied in full by payment of the amount of the judgment and costs to the clerk of the court in open court." P. demurred, but the court overruled the demurrer. Was this error? *yes. Why?*

*Blann v Cribbs 20 Ala. 320 - 1862*

22. P. sued D. in an action of trespass for damages in cutting and carrying away logs, found by the jury to be of the value of \$1000. The facts showed that the trespass had been committed jointly by C. and D., and that afterward P. entered into an agreement with C., that in consideration of C.'s paying \$200. P. would not sue C. for the trespass; that it was not understood that the \$200 compensated P. for the trespass, or for the timber, but simply that for that sum paid by C., P. would look to other parties for the balance; that the damages had not then been ascertained; that C. had paid the amount, and that it was fully understood between them that P. intended to look to others for the balance. On these facts the court gave judgment to P. against D. for \$1000 less \$200 paid by C. D. appeals claiming error, on the ground that the receipt of \$200 from C. and his release, released D. Was this error? *no. Why?*

*50 Wis 138 - 1883.*

23. D1., D2., and D3., who live in different counties, jointly commit a trespass against P. who sues them separately in the counties of their respective residences; the cases are tried by separate juries, and judgments given as follows: Against D1., \$800; against D2., \$900; against D3., \$1000. Suppose P. believes

The following information was obtained from the files of the Department of Education:

[The rest of the document contains extremely faint, illegible text.]

[illegible]

This is a copy of the original document. The text is a letter from the Secretary of the Department of the Interior to the Secretary of the Department of the Army, dated 1890. The letter discusses the proposed construction of a dam on the Colorado River, and the Department of the Interior's position on the matter. The letter is signed by the Secretary of the Department of the Interior, and is dated 1890.

1. The first of these is the fact that the
 2. second of these is the fact that the
 3. third of these is the fact that the
 4. fourth of these is the fact that the
 5. fifth of these is the fact that the
 6. sixth of these is the fact that the
 7. seventh of these is the fact that the
 8. eighth of these is the fact that the
 9. ninth of these is the fact that the
 10. tenth of these is the fact that the

that D3. is able to pay, he takes out execution against him, and gets only \$500. What may he do as to the other judgments? Why? *never been decided by a court.*

Or again, suppose that P. believes D1. is the only defendant that is able to pay in full, and he accordingly takes out execution against him, but is able to get only \$400 from him. What may he do further as to the other judgments? Why?

*(?) see 3 Wallace (U.S.) 1 - 1865*

24. D1., D2., and D3., are individual and separate creditors of X. They separately on the same day, acting upon the same advice, but not in concert, sue out writs of attachment against X., upon property which they have reasonable grounds for believing has been conveyed by X. to P. in order to defraud his creditors. These writs are all put in the hands of S. the sheriff, who, after taking separate indemnity bonds from D1., D2., and D3., proceeds to levy the writs at the same time, take the property, sell it, and pay the debt of D1. \$200, the debt of D2., \$300, and of D3., \$400. P. who had purchased from X., sues D3. upon the indemnity bond given to the sheriff, and gets judgment against him, which he pays in full. D3. then sues D1. and D2. for contribution. Is he entitled to such? If so to what extent?  $\frac{1}{3}$  Why?

*N. V. P. 107 Ala. 547 - 1894*

25. D. is B's agent. B. claims title to certain land of which P. has taken possession. So far as D. knows B's claim is made in good faith. B. directs D. to bring suit to have P. ousted; D. does this in a court which gives judgment for B., and P. is removed accordingly. It then turns out that the court ordering the removal had no jurisdiction in such cases. P. then sues D. and B. jointly, and gets judgment, which D. pays in full. D. then sues B. for the amount paid. Can he recover? *yes* Why?

*Culmer & Wilson 13 Utah 129*

26. P. is a turnpike company; D. a milling company. D. without consent of P. enters upon the turnpike of P. and digs a deep ditch, which D. negligently leaves open and unguarded, so that C. in the exercise of due care is injured by falling in it. C. sues P. and gets judgment, which P. pays in full. Then P. sues D. for the sum paid. Can he recover? Why?

*13 Ind. Appeals 481 - 1896*

27. D1. and D2. were counties upon which was by statute placed the duty of keeping bridges in repair, and making them liable to persons hurt through their negligence in this particular. P. was hurt by breaking down of a bridge across a river on the county line, which bridge it was the joint duty of D1. and D2. to keep in repair. Some time before the commissioners of

[illegible]



both counties had examined the bridge and ordered some slight repairs, but owing to error of judgment these were insufficient. P. sued D1.--got judgment for \$1100, which D1. paid in full, and then D1. sued D2. for contribution. The court below non-suited D1. on the ground that there could be no contribution. Was this error? <sup>yes</sup> Why?

*Armstrong Co. v. C*

*Co. 66 Penna St. 218 — 1870.*

-----00000-----

on English. The first of these is the "English" style, which is the most common. The second is the "French" style, which is less common. The third is the "German" style, which is also less common. The fourth is the "Italian" style, which is the least common. The fifth is the "Spanish" style, which is also less common. The sixth is the "Portuguese" style, which is also less common. The seventh is the "Dutch" style, which is also less common. The eighth is the "Belgian" style, which is also less common. The ninth is the "Austrian" style, which is also less common. The tenth is the "Swiss" style, which is also less common. The eleventh is the "Danish" style, which is also less common. The twelfth is the "Norwegian" style, which is also less common. The thirteenth is the "Swedish" style, which is also less common. The fourteenth is the "Finnish" style, which is also less common. The fifteenth is the "Icelandic" style, which is also less common. The sixteenth is the "Greek" style, which is also less common. The seventeenth is the "Turkish" style, which is also less common. The eighteenth is the "Arabic" style, which is also less common. The nineteenth is the "Hebrew" style, which is also less common. The twentieth is the "Yiddish" style, which is also less common. The twenty-first is the "Persian" style, which is also less common. The twenty-second is the "Urdu" style, which is also less common. The twenty-third is the "Hindi" style, which is also less common. The twenty-fourth is the "Bengali" style, which is also less common. The twenty-fifth is the "Sinhalese" style, which is also less common. The twenty-sixth is the "Tamil" style, which is also less common. The twenty-seventh is the "Telugu" style, which is also less common. The twenty-eighth is the "Kannada" style, which is also less common. The twenty-ninth is the "Malayalam" style, which is also less common. The thirtieth is the "Malay" style, which is also less common. The thirty-first is the "Indonesian" style, which is also less common. The thirty-second is the "Vietnamese" style, which is also less common. The thirty-third is the "Thai" style, which is also less common. The thirty-fourth is the "Lao" style, which is also less common. The thirty-fifth is the "Burmese" style, which is also less common. The thirty-sixth is the "Cambodian" style, which is also less common. The thirty-seventh is the "Laotian" style, which is also less common. The thirty-eighth is the "Siamese" style, which is also less common. The thirty-ninth is the "Thai" style, which is also less common. The fortieth is the "Vietnamese" style, which is also less common. The forty-first is the "Indonesian" style, which is also less common. The forty-second is the "Malay" style, which is also less common. The forty-third is the "Tamil" style, which is also less common. The forty-fourth is the "Telugu" style, which is also less common. The forty-fifth is the "Kannada" style, which is also less common. The forty-sixth is the "Malayalam" style, which is also less common. The forty-seventh is the "Burmese" style, which is also less common. The forty-eighth is the "Lao" style, which is also less common. The forty-ninth is the "Thai" style, which is also less common. The fiftieth is the "Vietnamese" style, which is also less common. The fifty-first is the "Indonesian" style, which is also less common. The fifty-second is the "Malay" style, which is also less common. The fifty-third is the "Tamil" style, which is also less common. The fifty-fourth is the "Telugu" style, which is also less common. The fifty-fifth is the "Kannada" style, which is also less common. The fifty-sixth is the "Malayalam" style, which is also less common. The fifty-seventh is the "Burmese" style, which is also less common. The fifty-eighth is the "Lao" style, which is also less common. The fifty-ninth is the "Thai" style, which is also less common. The sixtieth is the "Vietnamese" style, which is also less common. The sixty-first is the "Indonesian" style, which is also less common. The sixty-second is the "Malay" style, which is also less common. The sixty-third is the "Tamil" style, which is also less common. The sixty-fourth is the "Telugu" style, which is also less common. The sixty-fifth is the "Kannada" style, which is also less common. The sixty-sixth is the "Malayalam" style, which is also less common. The sixty-seventh is the "Burmese" style, which is also less common. The sixty-eighth is the "Lao" style, which is also less common. The sixty-ninth is the "Thai" style, which is also less common. The seventieth is the "Vietnamese" style, which is also less common. The seventy-first is the "Indonesian" style, which is also less common. The seventy-second is the "Malay" style, which is also less common. The seventy-third is the "Tamil" style, which is also less common. The seventy-fourth is the "Telugu" style, which is also less common. The seventy-fifth is the "Kannada" style, which is also less common. The seventy-sixth is the "Malayalam" style, which is also less common. The seventy-seventh is the "Burmese" style, which is also less common. The seventy-eighth is the "Lao" style, which is also less common. The seventy-ninth is the "Thai" style, which is also less common. The eightieth is the "Vietnamese" style, which is also less common. The eighty-first is the "Indonesian" style, which is also less common. The eighty-second is the "Malay" style, which is also less common. The eighty-third is the "Tamil" style, which is also less common. The eighty-fourth is the "Telugu" style, which is also less common. The eighty-fifth is the "Kannada" style, which is also less common. The eighty-sixth is the "Malayalam" style, which is also less common. The eighty-seventh is the "Burmese" style, which is also less common. The eighty-eighth is the "Lao" style, which is also less common. The eighty-ninth is the "Thai" style, which is also less common. The ninetieth is the "Vietnamese" style, which is also less common. The ninety-first is the "Indonesian" style, which is also less common. The ninety-second is the "Malay" style, which is also less common. The ninety-third is the "Tamil" style, which is also less common. The ninety-fourth is the "Telugu" style, which is also less common. The ninety-fifth is the "Kannada" style, which is also less common. The ninety-sixth is the "Malayalam" style, which is also less common. The ninety-seventh is the "Burmese" style, which is also less common. The ninety-eighth is the "Lao" style, which is also less common. The ninety-ninth is the "Thai" style, which is also less common. The hundredth is the "Vietnamese" style, which is also less common.

1. *Chlorophyll a* and *b* contents were determined by the method of Lichtenthal and Whistler (1973).

by

Prof. Wilgus.

Persons Affected by Torts.

General Rule: There is no limit, merely on account of personal capacity, either to liability, or to right to recover for torts.

Theory of the law: The contracts of certain persons are not binding upon them because the law designs to protect them from their unwise promises; so, in crimes, the law designs to punish guilt, and therefore, holds no one, unable to form the guilty intent, for their criminal acts; but in the case of torts, the law designs to compensate the person injured for the injury done him,--hence it holds all who cause an injury liable for the resulting damage.

Limitation on the General Rule:

In reason, however, where a particular intent, knowledge, or mental condition is a necessary element of a particular tort (as in malicious prosecution) a person charged with a tort should not be held liable unless he is shown to have the capacity to have that intent, knowledge, or mental state, as a matter of fact; otherwise that particular tort has not been committed by him.

Lunatics.

General rule: Lunatics have the same right to recover for torts done them as other persons, his guardian or Committee bringing the suit; so insane persons are, in general, liable for the torts they commit.

Limitations:

Where malice is a necessary element of a tort, that tort cannot be committed by an insane person, who is, at the time incapable of having such malice.

Measure of damages: The amount of damages should be limited to actual loss in case of torts by insane persons; while in cases of torts by sane persons it is proper that compensation should be commensurate with the malignity of the motive with which the act was done,--that is, in many cases exemplary damages may be allowed as a punishment; but a lunatic not having mind sufficient to form the malignant motive should not be subjected to payment of exemplary damages.

Negligence: An insane person is liable for negligence, like a sane person, unless the insanity has been produced by extraordinary peril and exertion in attempting, at the time, to protect person or property from peril.

## THE HISTORY OF THE

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

Infants.

General rule: An infant has the same right to recover for torts suffered by him as any other person, suit being brought by his guardian or next friend (i. e. anyone who will undertake the suit for him); so, also, an infant is generally responsible for his torts the same as any other person.

Limitations:

Negligence,-- A mere child cannot be accountable for not using the discretion of an adult, but only for not using that care ordinarily used by others of his age. Infancy is an important element not only to determine whether the child has been negligent, but also whether the adult plaintiff or defendant was himself negligent; for what would be due care toward an adult, is frequently great negligence toward small children. This is illustrated in cases where dangerous machinery is left unguarded, in places where it is likely to attract children and induce them to meddle with it,-- e. g. unlocked railroad turntables near children's playgrounds.

Malice: When malice is an essential element of a tort, it is a question of fact to be determined from the age and mental capacity, whether such malice can or cannot be imputed to the infant charged.-- If it cannot be, the tort has not been committed by him. The rules of the Criminal law that a child under 7 can not have a felonious intent, between 7 and 14, is presumed incapable of having such an intent, and over 14 is presumed capable of having such intent, do not apply in the same way in torts; In torts the question of capacity of the infant to form the malicious intent necessary is to be determined by the jury from the evidence before them as to the child's actual capacity.

Contracts:

Since an infant is not bound by his contracts, if a wrong grows out of the contract made by the infant, in which the real injury arises from the non-performance of the contract the law will not permit the contract to be indirectly enforced by suing in tort; but if the contract simply serves as the occasion whereby the infant is enabled to commit an independent tort not arising from the mere non-performance of the contract, the infant may be sued for the tort.

Age,-- A false representation as to his age whereby a person is induced to contract with the infant believing him to be of age, is not such a wrong as will enable the person defrauded to maintain an action of tort. There are well considered cases, and perhaps supported by the best reason, to the contrary.



If the infant obtains property by such representations, while his right to disaffirm his contract is not defeated by a failure to return the property so obtained, yet he will not be permitted both to disaffirm his contract and retain such of the property as remains in his possession at the time of the disaffirmance. It may be sued for in replevin or trover.

Command or advice: An infant is not excused from liability by showing that he committed the tort under advice.

Parents are not liable for the torts of their children committed without their authority, or consent, or while not engaged in performing services for the parent.

#### Married women.

At Common Law. General rule: A married woman was liable for her torts to the same extent as other persons; but her husband, if alive, was entitled to recover for torts suffered by her.

Exception. She was not liable for fraudulantly inducing another to contract with her by falsely claiming to be unmarried.

Suits, however, for the torts of a married woman must be against both husband and wife, and because he was entitled to all her property and the income and profits of her real property, he must, if alive, pay the judgment. If, however, the wife survived the husband, she alone was liable for the tort not prosecuted to judgment before the husband's death.

Torts committed in the presence of the husband, by the wife, were presumed to be the torts of the husband alone; but this presumption could be rebutted and the tort shown to be the joint tort of the husband and wife, or the tort of the wife alone; yet while alive the husband was liable in either case.

Under Married Women's Acts: These usually enable the wife to own and control her own property, and sue and be sued alone for her own torts. In some states it is held that the husband is not relieved from liability for the wife's torts unless expressly so stated; while in other states it is held that taking away his right to the wife's property also took away his liability for her torts.

Husband and Wife are not liable for torts against each other's person; but in case of threats and violence either, on complaint of the other, could be put under bonds to keep the peace. Under recent Statutes they probably are liable for injuries done to each other's property.

1. The first step is to identify the problem. This involves understanding the situation and the goals that need to be achieved.

[illegible]

The first of these is the fact that the
 defendant's conduct was not a crime under
 the law of the State of New York at the
 time it was committed. The defendant was
 charged with the crime of "obscenity,"
 which is defined in the New York Penal
 Law as "any act or omission which is
 deemed to be obscene by the community
 standards of the State of New York."
 The defendant's conduct was not deemed
 to be obscene by the community standards
 of the State of New York at the time
 it was committed.



Drunkards: one who is drunk at the time he commits a tort is liable for it. In other words drunkenness does not excuse. In some cases, as malicious prosecution, or libel, or slander, the fact of drunkenness may be shown in mitigation of damages. Drunkenness does not excuse the drunken person from liability for negligence; but the known drunkenness of a plaintiff at the time may be such as to require a greater degree of care for his protection from one who is in a position to do him damage.

Duress, does not excuse torts by the one under compulsion at the time. It has been said however, that obeying commands of military officers in actual military service at the time, is an excuse.

Private Corporations. A private corporation is liable for torts committed upon its behalf by its agents and servants, while engaged in the corporate business, substantially the same as a master for the acts of his servant. They have been held liable for assault, battery, false imprisonment, malicious prosecution, libel, trespass upon property, conversion, conspiracy, deceit, infringements of patents and copyrights, nuisance, and negligence. It is said that a corporation can can not be guilty of slander,--because it can act only by a deputy or agent, and slander cannot be committed by deputy. This is an old technical rule of slander, that it is believed is passing away.

Ultra vires torts,-- When a corporation through its proper controlling officers has engaged in lines of business not authorized by its charter, and in the management and conduct of that business, torts are committed by the agents and servants of the corporation, such corporation, by the great weight of authority, is liable therefor. There are some cases to the contrary.

Charitable Corporations,-- Private corporations, organized for public charitable purposes, and not for profit, are not liable for the torts of their officers, agents or servants done in the administration of the charity, or rendering the services for which they were formed. Such torts are considered to be only those of the persons committing them, and they should bear the loss, rather than the funds of the charity be taken

...the other words, the word "not" is not used in a negative sense, but in a positive sense, as in the case of the word "yes". The word "not" is used in a positive sense, as in the case of the word "yes". The word "not" is used in a positive sense, as in the case of the word "yes".

...the other words, the word "not" is not used in a negative sense, but in a positive sense, as in the case of the word "yes". The word "not" is used in a positive sense, as in the case of the word "yes". The word "not" is used in a positive sense, as in the case of the word "yes".

...the other words, the word "not" is not used in a negative sense, but in a positive sense, as in the case of the word "yes". The word "not" is used in a positive sense, as in the case of the word "yes". The word "not" is used in a positive sense, as in the case of the word "yes".

...the other words, the word "not" is not used in a negative sense, but in a positive sense, as in the case of the word "yes". The word "not" is used in a positive sense, as in the case of the word "yes". The word "not" is used in a positive sense, as in the case of the word "yes".

...the other words, the word "not" is not used in a negative sense, but in a positive sense, as in the case of the word "yes". The word "not" is used in a positive sense, as in the case of the word "yes". The word "not" is used in a positive sense, as in the case of the word "yes".

to pay the loss. It is said however, if such corporations give their services for pay, with a view to profit, they become liable for torts as other corporations.

Public Corporations: These are such as are organized primarily for governmental purposes, and include the National Government, the State governments, the various Municipal Corporations that are organized under charters granted by the State, and public quasi-corporations, that have some, but not all, of the powers of corporations, such as county and township organizations.

As to the National and State governments, while their acts may be such as if done by private persons would give a right of action, neither of these can be sued without their consent being first given by legislative or constitutional provisions. Hence they are not liable for their tortious acts except so far as they have expressly provided for suits against them. Statutes frequently provide, however, that the Nation or State may be sued in certain cases, or in certain Courts, as the U. S. in the U. S. Court of Claims.

As to municipal corporations, and quasi-corporations, they are almost universally allowed to sue and be sued.

But in all these cases,--where suits are permitted to be brought, whether such public corporations shall be held liable for their tortious acts depends upon the function they are at the time exercising. Their functions are usually classed into,

(a) Governmental,--for purely public purposes,--merely as a part of the governmental machinery of the State. And although these are either legislative, judicial, executive, or administrative, and are largely of a discretionary character, they are conferred upon the particular corporate body not for the special benefit of it or its members, but for the general, public welfare, to be wielded as a part of the governmental machinery of state. The officers selected by them for these purposes are not their servants, but are State officers, who act upon their own responsibility. The State merely provides the method of their selection, and designates their powers, but does not insure their capacity or faithfulness, except indirectly by providing punishments for their short comings.

SECRET

1. The following information was obtained from a review of the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California:

2. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

3. The land is owned by the United States in several different capacities, including:

- a. National Forest Land
- b. National Monument Land
- c. National Park Land
- d. National Wildlife Refuge Land
- e. National Antiquities Land
- f. National Historic Land
- g. National Monument Land
- h. National Park Land
- i. National Wildlife Refuge Land
- j. National Antiquities Land
- k. National Historic Land

4. The land is owned by the United States in several different capacities, including:

- a. National Forest Land
- b. National Monument Land
- c. National Park Land
- d. National Wildlife Refuge Land
- e. National Antiquities Land
- f. National Historic Land
- g. National Monument Land
- h. National Park Land
- i. National Wildlife Refuge Land
- j. National Antiquities Land
- k. National Historic Land

5. The land is owned by the United States in several different capacities, including:

- a. National Forest Land
- b. National Monument Land
- c. National Park Land
- d. National Wildlife Refuge Land
- e. National Antiquities Land
- f. National Historic Land
- g. National Monument Land
- h. National Park Land
- i. National Wildlife Refuge Land
- j. National Antiquities Land
- k. National Historic Land

6. The land is owned by the United States in several different capacities, including:

- a. National Forest Land
- b. National Monument Land
- c. National Park Land
- d. National Wildlife Refuge Land
- e. National Antiquities Land
- f. National Historic Land
- g. National Monument Land
- h. National Park Land
- i. National Wildlife Refuge Land
- j. National Antiquities Land
- k. National Historic Land

7. The land is owned by the United States in several different capacities, including:

- a. National Forest Land
- b. National Monument Land
- c. National Park Land
- d. National Wildlife Refuge Land
- e. National Antiquities Land
- f. National Historic Land
- g. National Monument Land
- h. National Park Land
- i. National Wildlife Refuge Land
- j. National Antiquities Land
- k. National Historic Land

8. The land is owned by the United States in several different capacities, including:

- a. National Forest Land
- b. National Monument Land
- c. National Park Land
- d. National Wildlife Refuge Land
- e. National Antiquities Land
- f. National Historic Land
- g. National Monument Land
- h. National Park Land
- i. National Wildlife Refuge Land
- j. National Antiquities Land
- k. National Historic Land

9. The land is owned by the United States in several different capacities, including:

- a. National Forest Land
- b. National Monument Land
- c. National Park Land
- d. National Wildlife Refuge Land
- e. National Antiquities Land
- f. National Historic Land
- g. National Monument Land
- h. National Park Land
- i. National Wildlife Refuge Land
- j. National Antiquities Land
- k. National Historic Land

10. The land is owned by the United States in several different capacities, including:

- a. National Forest Land
- b. National Monument Land
- c. National Park Land
- d. National Wildlife Refuge Land
- e. National Antiquities Land
- f. National Historic Land
- g. National Monument Land
- h. National Park Land
- i. National Wildlife Refuge Land
- j. National Antiquities Land
- k. National Historic Land

, enclosed, the following information for your information:

1. The first step is to identify the problem. This involves understanding the situation and the goals that need to be achieved.

1. The first of these is the fact that the
 2.
 3.
 4.
 5.
 6.
 7.
 8.
 9.
 10.
 11.
 12.
 13.
 14.
 15.
 16.
 17.
 18.
 19.
 20.
 21.
 22.
 23.
 24.
 25.
 26.
 27.
 28.
 29.
 30.
 31.
 32.
 33.
 34.
 35.
 36.
 37.
 38.
 39.
 40.
 41.
 42.
 43.
 44.
 45.
 46.
 47.
 48.
 49.
 50.
 51.
 52.
 53.
 54.
 55.
 56.
 57.
 58.
 59.
 60.
 61.
 62.
 63.
 64.
 65.
 66.
 67.
 68.
 69.
 70.
 71.
 72.
 73.
 74.
 75.
 76.
 77.
 78.
 79.
 80.
 81.
 82.
 83.
 84.
 85.
 86.
 87.
 88.
 89.
 90.
 91.
 92.
 93.
 94.
 95.
 96.
 97.
 98.
 99.
 100.
 101.
 102.
 103.
 104.
 105.
 106.
 107.
 108.
 109.
 110.
 111.
 112.
 113.
 114.
 115.
 116.
 117.
 118.
 119.
 120.
 121.
 122.
 123.
 124.
 125.
 126.
 127.
 128.
 129.
 130.
 131.
 132.
 133.
 134.
 135.
 136.
 137.
 138.
 139.
 140.
 141.
 142.
 143.
 144.
 145.
 146.
 147.
 148.
 149.
 150.
 151.
 152.
 153.
 154.
 155.
 156.
 157.
 158.
 159.
 160.
 161.
 162.
 163.
 164.
 165.
 166.
 167.
 168.
 169.
 170.
 171.
 172.
 173.
 174.
 175.
 176.
 177.
 178.
 179.
 180.
 181.
 182.
 183.
 184.
 185.
 186.
 187.
 188.
 189.
 190.
 191.
 192.
 193.
 194.
 195.
 196.
 197.
 198.
 199.
 200.
 201.
 202.
 203.
 204.
 205.
 206.
 207.
 208.
 209.
 210.
 211.
 212.
 213.
 214.
 215.
 216.
 217.
 218.
 219.
 220.
 221.
 222.
 223.
 224.
 225.
 226.
 227.
 228.
 229.
 230.
 231.
 232.
 233.
 234.
 235.
 236.
 237.
 238.
 239.
 240.
 241.
 242.
 243.
 244.
 245.
 246.
 247.
 248.
 249.
 250.
 251.
 252.
 253.
 254.
 255.
 256.
 257.
 258.
 259.
 260.
 261.
 262.
 263.
 264.
 265.
 266.
 267.
 268.
 269.
 270.
 271.
 272.
 273.
 274.
 275.
 276.
 277.
 278.
 279.
 280.
 281.
 282.
 283.
 284.
 285.
 286.
 287.
 288.
 289.
 290.
 291.
 292.
 293.
 294.
 295.
 296.
 297.
 298.
 299.
 300.
 301.
 302.
 303.
 304.
 305.
 306.
 307.
 308.
 309.
 310.
 311.
 312.
 313.
 314.
 315.
 316.
 317.
 318.
 319.
 320.
 321.
 322.
 323.
 324.
 325.
 326.
 327.
 328.
 329.
 330.
 331.
 332.
 333.
 334.
 335.
 336.
 337.
 338.
 339.
 340.
 341.
 342.
 343.
 344.
 345.
 346.
 347.
 348.
 349.
 350.
 351.
 352.
 353.
 354.
 355.
 356.
 357.
 358.
 359.
 360.
 361.
 362.
 363.
 364.
 365.
 366.
 367.
 368.
 369.
 370.
 371.
 372.
 373.
 374.
 375.
 376.
 377.
 378.
 379.
 380.
 381.
 382.
 383.
 384.
 385.
 386.
 387.
 388.
 389.
 390.
 391.
 392.
 393.
 394.
 395.
 396.
 397.
 398.
 399.
 400.
 401.
 402.
 403.
 404.
 405.
 406.
 407.
 408.
 409.
 410.
 411.
 412.
 413.
 414.
 415.
 416.
 417.
 418.
 419.
 420.
 421.
 422.
 423.
 424.
 425.
 426.
 427.
 428.
 429.
 430.
 431.
 432.
 433.
 434.
 435.
 436.
 437.
 438.
 439.
 440.
 441.
 442.
 443.
 444.
 445.
 446.
 447.
 448.
 449.
 450.
 451.
 452.
 453.
 454.
 455.
 456.
 457.
 458.
 459.
 460.
 461.
 462.
 463.
 464.
 465.
 466.
 467.
 468.
 469.
 470.
 471.
 472.
 473.
 474.
 475.
 476.
 477.
 478.
 479.
 480.
 481.
 482.
 483.
 484.
 485.
 486.
 487.
 488.
 489.
 490.
 491.
 492.
 493.
 494.
 495.
 496.
 497.
 498.
 499.
 500.
 501.
 502.
 503.
 504.
 505.
 506.
 507.
 508.
 509.
 510.
 511.
 512.
 513.
 514.
 515.
 516.
 517.
 518.
 519.
 520.
 521.
 522.
 523.
 524.
 525.
 526.
 527.
 528.
 529.
 530.
 531.
 532.
 533.
 534.
 535.
 536.
 537.
 538.
 539.
 540.
 541.
 542.
 543.
 544.
 545.
 546.
 547.
 548.
 549.
 550.
 551.
 552.
 553.
 554.
 555.
 556.
 557.
 558.
 559.
 560.
 561.
 562.
 563.
 564.
 565.
 566.
 567.
 568.
 569.
 570.
 571.
 572.
 573.
 574.
 575.
 576.
 577.
 578.
 579.
 580.
 581.
 582.
 583.
 584.
 585.
 586.
 587.
 588.
 589.
 590.
 591.
 592.
 593.
 594.
 595.
 596.
 597.
 598.
 599.

(b) Private,-- or purely corporate,--for purposes beyond or in addition to the purely governmental functions as an instrument of the State; such as authorities engaging in business of a private or profitable kind, for the special benefit of the particular corporation, rather than for the public benefit of all the citizens of the State. For example, the State itself might engage in farming or mining, or become a shareholder in a bank, etc. But here, a more or less well defined distinction arises, mainly of a historical rather than of a logical character, which presumes that all the functions exercised by the State or public quasi-corporations, like counties, townships, road and school districts, are of a purely governmental character, and not conferred upon them for their private welfare; their buildings, the State house, the Court house, the schoolhouse,--their lands,--parks, school grounds, and public roads,--are public property and are controlled and managed for public purposes in the exercise of governmental powers. So all provisions regulating the public health, the public safety, the public morals, and the control and management of the instruments necessary therefor, are exercises of the governmental functions for public purposes. In the absence of special statutes making such quasi-corporate bodies liable for the improper exercise, or the failure to exercise, such powers resulting in damage to a particular person there is no liability. There is poor or bad government, but no violation by the quasi corporation of any special duty to the person hurt, but only a violation of a duty owed to all the public alike.

In the case of purely municipal corporations, those that have been incorporated, there is a somewhat different presumption, based mostly upon historical reasons. By incorporation they were considered as becoming artificial persons, and capable of holding and owning property, rights and privileges, like individuals, some of which might be conferred upon them for their special use and benefit, while others were delegated to them not so much as privileges as duties placed upon them as instruments of government, in return for the special privileges granted. What shall be considered the one or the other of course depends as much or more upon the Statutory provision, as upon the inherent nature of the power itself. No reliable test has yet been found for determining this matter. The rule, however, is fairly well settled that if the power is one conferred by the State for governmental purposes, the municipal corporation is not liable for its acts or failure to act;

[illegible]

Whereas if it is conferred for the special benefit of the municipality, it is liable for resulting damages arising, not usually from failure to act, but improper action after it undertakes to act.

Streets: Although it is considered a governmental function upon the part of the state to provide and keep in repair the roads and highways from place to place in the state, the power of control, construction and repair of streets in an incorporated city, which has been authorized to open streets and lay taxes for their improvement, has been considered as a private function for the special benefit of the city and its inhabitants, rather than a governmental function of the state. This perhaps has been in some measure due to the original idea that a street is a paved way, and not merely a roadway, and that the numerous paved streets in cities are luxuries or special conveniences of the inhabitants of the cities, rather than a governmental necessity. It is therefore, generally held that in the construction, repair and management of its streets a city is liable for damage resulting from the negligent or improper performance of its duties.

Sidewalks: These come under the same category as streets,-- in fact a sidewalk is considered a part of a street.

Sewers: Although we now consider sewers as being constructed mainly for the preservation of public health of a city, perhaps they were originally considered rather as drains for the convenience of those whose lands and dwellings were accommodated by them. At any event, it is pretty generally held that a sewerage system of a municipal corporation is constructed for its private advantage rather than for the protection of the public health of the state, and so in its construction and use the city becomes liable for damages arising through the cities negligence. There are cases to the contrary.

Fire, Water, and Light: Although these departments now seem to be so much for the private convenience of the members of the City, it is quite probable that they were originally devised mainly for the purpose of making efficient the police power of the State in providing for the protection of property and life, in an overcrowded and congested locality. In other words were instruments invented for the purpose of helping in the performance of the delegated governmental power of protecting life and

[illegible]

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE  
FOR THE YEAR 1891

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation.

2. The second step is the collection of data. This is done by the investigator who is responsible for the investigation. The investigator must collect data from the sources that are available to him or her.

3. The third step is the analysis of the data. This is done by the investigator who is responsible for the investigation. The investigator must analyze the data and determine the cause of the problem.

4. The fourth step is the development of a solution. This is done by the investigator who is responsible for the investigation. The investigator must develop a solution to the problem and implement it.

5. The fifth step is the evaluation of the solution. This is done by the investigator who is responsible for the investigation. The investigator must evaluate the solution and determine if it is effective.

6. The sixth step is the documentation of the investigation. This is done by the investigator who is responsible for the investigation. The investigator must document the investigation and the results of the investigation.

7. The seventh step is the communication of the results of the investigation. This is done by the investigator who is responsible for the investigation. The investigator must communicate the results of the investigation to the appropriate parties.

8. The eighth step is the follow-up. This is done by the investigator who is responsible for the investigation. The investigator must follow-up on the investigation and determine if the problem has been resolved.

9. The ninth step is the review of the investigation. This is done by the investigator who is responsible for the investigation. The investigator must review the investigation and determine if it was conducted properly.

10. The tenth step is the conclusion. This is done by the investigator who is responsible for the investigation. The investigator must conclude the investigation and determine the final outcome.

1. The following information was obtained from the file of the  
 2. Bureau of the Federal Bureau of Investigation, Department of Justice,  
 3. Bureau of the Federal Bureau of Investigation, Department of Justice,  
 4. Bureau of the Federal Bureau of Investigation, Department of Justice,  
 5. Bureau of the Federal Bureau of Investigation, Department of Justice,  
 6. Bureau of the Federal Bureau of Investigation, Department of Justice,  
 7. Bureau of the Federal Bureau of Investigation, Department of Justice,  
 8. Bureau of the Federal Bureau of Investigation, Department of Justice,  
 9. Bureau of the Federal Bureau of Investigation, Department of Justice,  
 10. Bureau of the Federal Bureau of Investigation, Department of Justice,



property. At any event they are usually considered as being governmental in character, rather than private, and by the weight of authority, no right of action arises against the municipality for negligence or failure in the due exercise of such functions. There are however, many well considered cases to the contrary, especially in the operation of water, gas, or electric light plants, which undertake to furnish water or light to private persons for a compensation. In these cases the public function is considered to be merged, to a great degree at least, into the private business of supplying private individuals, and private liability therefore arises.

Police. In the preservation of the public peace, and safety, whether under State laws or through authorized city ordinances, the municipality is considered as exercising public or governmental functions only, and is not liable for damages resulting from its failure or negligence. There are some cases under special or peculiar circumstances, holding otherwise; but these are anomalous.

Public Schools: While city officers are frequently placed in authority over the city schools,--the public schools are a part of the State public school system, and city officers in control thereof, are in the exercise of governmental powers, from which no municipal liability arises.

Street-railways,-- operated by municipality,--whether such is or is not a governmental function, is yet a matter of speculation, at least in the United States.

Public Officers,-- The foregoing has related to the liability of the public corporation, itself, and not to the officer, agent, or servant of the corporation. Such officers, agents, and servants, act upon their own responsibility, and whether they are liable or not depends upon the question as to whom the duties placed upon them are due,-- whether to the public alone, or whether to private parties also; if the former they are liable only to the public, even though a particular person may be hurt; if the latter, they are then liable to both. This matter, however, is fully discussed further along by Judge Cooley.

This is a copy of the original document. The original document is a letter from the Secretary of the Department of the Interior to the Secretary of the Department of the Army, dated 1900. The letter is dated 1900 and is addressed to the Secretary of the Department of the Army. The letter is dated 1900 and is addressed to the Secretary of the Department of the Army. The letter is dated 1900 and is addressed to the Secretary of the Department of the Army.

1. The first of the above is the fact that the  
2. The second of the above is the fact that the  
3. The third of the above is the fact that the  
4. The fourth of the above is the fact that the  
5. The fifth of the above is the fact that the  
6. The sixth of the above is the fact that the  
7. The seventh of the above is the fact that the  
8. The eighth of the above is the fact that the  
9. The ninth of the above is the fact that the  
10. The tenth of the above is the fact that the

1. In 1944, the United States and the United Kingdom  
2. were the only two countries in the world that  
3. had a large number of troops in the Pacific.  
4. The United States had about 1 million troops  
5. and the United Kingdom had about 500,000 troops.  
6. The rest of the world had very few troops.

1. The following information was obtained from the file of the  
2. Bureau of the Federal Bureau of Investigation, Department of Justice, dated  
3. 10/10/54, and is being furnished to you for your information.  
4. The information is being furnished to you for your information.  
5. The information is being furnished to you for your information.

1. The first of these is the fact that the  
2. The second is the fact that the  
3. The third is the fact that the  
4. The fourth is the fact that the  
5. The fifth is the fact that the  
6. The sixth is the fact that the  
7. The seventh is the fact that the  
8. The eighth is the fact that the  
9. The ninth is the fact that the  
10. The tenth is the fact that the

## PROBLEMS AS TO LIABILITY OF PERSONS.

1. P. owns a horse which he hires to D. whom he knows to be insane at the time. D. kills the horse, and P. sues him for the loss. Is D. liable? Why? *yes.*

*17 Ver. 499 — 1845*

2. D. is an insane hotel keeper. P. knowing this fact puts up at the hotel, where his goods are stolen. P. sues D. for the loss. Can he recover? Why? *yes.*

*2 Crokes. Eliz. 622 — 1586*

A. insures his life in D. an insurance company, in favor of P. for \$1,000. Afterwards P. becomes insane and killed A. He then sues the insurance company, D. for \$1,000. Can he recover? Why? *yes.*

*Holden v. A. O. N. W. 159 Ill 619.*

4. D. was the owner of a house; for several years he had been insane, and was confined in a hospital for the insane, and at the time had a guardian appointed, who had the management and control of D's property. The doorstep of D's house was so defective that P. in the exercise of due care, and in the lawful use of the step, was injured by its breaking down. P. sued D. Is D. liable? Why? *yes.*

*132 Mass. 87 — 1882.*

5. D. is an insane justice of the peace; without any complaint being made before him, he issues a warrant for the arrest of P. charging him with perjury. The justice puts this warrant into the hands of a constable, who arrests P. and brings him before D. who directs P. to be kept in custody for 24 hours, which is done. Nothing further is done, and P. is then released. P. sues D. Is D. liable? Why? *not for*

*nom v. Schoemaker 3 Barber (N. Y.) 650*

6. D. is an insane person who conceals himself in P's barn. P. and his neighbors in trying to capture D. make him furious, whereupon he fires the barn, and shoots P's wife in his frenzy. Under Lord Campbell's Act, P. sues D. for the death of the wife. Is D. liable? Why? *yes.*

*121 Ill. 660 1887.*

7. P., B., and D. are joint owners of a vessel, which they put in the hands of D. to control and manage. Owing to extra exertion, loss of sleep, and long peril from a severe storm, D. becomes temporarily insane, and allows the vessel negligently to drift on the coast and become a wreck. P. and B. sue D. for the loss. Can they recover? Why? *no.*

*Williams v. Hayes 157 N. Y. 541 — 1879*  
*7 owner 143 N. Y. 442 — 1894*

1. The first of these is the fact that the...  
2. The second is the fact that the...

3. The third is the fact that the...  
4. The fourth is the fact that the...

5. The fifth is the fact that the...  
6. The sixth is the fact that the...

7. The seventh is the fact that the...  
8. The eighth is the fact that the...

9. The ninth is the fact that the...  
10. The tenth is the fact that the...

11. The eleventh is the fact that the...  
12. The twelfth is the fact that the...

13. The thirteenth is the fact that the...  
14. The fourteenth is the fact that the...

15. The fifteenth is the fact that the...  
16. The sixteenth is the fact that the...

17. The seventeenth is the fact that the...  
18. The eighteenth is the fact that the...

19. The nineteenth is the fact that the...  
20. The twentieth is the fact that the...

8. D. was under guardianship as insane, but representing to P. that the guardianship had been terminated, applied to him to act as his attorney in another matter. P. not knowing this was untrue, accepted, and entered upon the service, and took a mortgage upon D's land for his fee, which was represented to him to be unincumbered. But in order to preserve the mortgage P. paid off a judgment already a lien on the land. P. sued D. for the amount so paid. Is he liable? Why? *yes.*

*Spaulding v. Harvey 129 Ind. 106*

9. D. while notoriously insane falsely publishes in a newspaper of very extensive circulation, that P. is a murdered. P. sues D. in an action on the case for the libel; D. pleads the general issue,--that is, not guilty. At the trial D. offers to introduce evidence of insanity at the time of publication of the libel, as an excuse for the same. Is it admissible for that purpose, or for any purpose? Why? *Excuse in case of damages.*

*Dickenson v. Barber 9 Mass. 225 - 1812*

10. P. is an infant one year old, when his father dies, and lands descend to him. It was the duty of the father to maintain half of the partition fence. The child neglects to do so, so that the cattle of his neighbor D. get in and do damage. P. sues D. Can he recover? Why? *No.*

*Watfield v. 21 Wendell (N. Y.) 615*

11. D. is an infant one year old, when his father dies, and lands descend to him. It was the duty of the father to maintain half of the partition fence. The child neglects to do so, so that his cattle get on to P's land and do damage. P. sues D. Can he recover? Why? *yes.*

*Croley Torts p. 122.*

12. D. is an infant four years old; without the negligence of P., D. gets P's watch and breaks it, so as to make it worthless. P. sues D. Can he recover? Why? *yes.*

*Yearbook 25 Henry IV 116 - 1447*

13. D. is a boy six years old: he goes over into P's flower garden and pulls and tramples down the flowers. P. sues B. Can he recover? Why? *yes.*

*17 Win. 237 - 1853*

14. D. a boy 12 years old, while sitting in school, in fun and not intending to do any harm, kicked his neighbor boy P. on the leg; at that time there was a sore nearly healed on this boy's leg just above the knee. In consequence of the kick the sore broke out again, the bones below the knee became diseased, and serious results followed. P. sued D. Was he liable? Why? *yes.*

*Boswell*

*80 W. 523.*



15. D. a boy 13 years old, in sport, unintentionally, but not in mutual play threw a piece of mortar at B. but missed him and hit P. in the eye, and seriously injured him. P. sued D. Is D. liable? Why? *yes.*

*59 Ind. 130 - 1879.*

16. P's horses escape into B's land. B. directs his son D. fifteen years old, to turn them into the road, which he does, knowing them to be P's horses. They stray away and are lost. P. sues D. Is D. liable? Why? *yes.*

*10 Ver. p 71.*

17. D. a boy 19 years old, had the appearance of a person of twenty or over; he wished to purchase a supply of hats for resale, and applied to P. for that purpose; P. inquired if he was of full age, and was told he was, whereupon P. sold the hats to D. for \$57.00 and took D's note for the same; this was not paid when due, and the hats had been sold. P. sued D. on the note, and judgment was given for D. whereupon P.

sued D. for the fraudulent representation made by D., and alleged as damages the value of the hats, and the amount of costs he had to pay in the suit on the note; the jury gave a verdict for this amount, and interest, Was there error? Why? *Case held error. on damages for deceit.*

*7 N. H. 441 - 1838.*

18. D. is a boy under 21 years of age. He hires a horse and buggy of P. to go to Ypsilanti; but instead of going there, and without consent of the owner he goes to Whitmore Lake; while there the horse is struck by lightning and killed. P. sues D. for the loss. Is he liable? Why? *yes.* *(27 Am Reps 519.)*

*14 R. J. 134  
27 Mich 464*

19. D. purchased and gave a gun to his minor son, A. This boy was in the habit of using it negligently and recklessly, and this negligent use was known, countenanced, consented to, and encouraged by D. his father. One day A. came along where P. was leading a colt, and against P's protest, A. negligently fired the gun in front of the colt, which thereby became frightened, ran away, and P. becoming entangled in the rope with which the colt was led, was dragged a long distance and severely injured. P. sued D. Is he liable? Why? *yes.*

*J. V. 7. 11 S. D. 237*

*(note 74 Am State Report 801)*

20. D. was a boy 12 years old; about the fourth of July he obtained a giant fire cracker which after lighting he threw down under a horse belonging to P., where it exploded, and scared P's horse to death. P. sued D. Is D. liable? Why? *yes.*

*C. V. T. 29 Barber (N. Y.) 218 - 1859.*





21. P. a boy 10 years old, was D's son. D. in a fit of passion, intensified by drink, and without any justifiable cause, fiercely assaulted P., and permanently injured him by putting out P's eye. P. sued D. Can he recover? *No* Why?

*68 Miss. 703*

*(Ought to be yes, Wiggins)*

22. D., a boy 15 years old, was P's son. An uncle had left an estate worth \$100,000 to D., and G. had been appointed guardian of this estate until D. came of age. D. without justifiable reason assaulted his father and broke his arm, for which damage P. sued D. Is he entitled to recover? *No* Why? *(Reason for yes.)*

*no decision upon the case.*

23. D. is the father of P. a boy 5 years old, when an uncle of P. dies and leaves him a fine gold watch. D. the father takes charge of the watch, carries it around and uses it as his own. Through D's negligence the watch is broken, and becomes worthless. P. through a next friend, sues D. for the value of the watch. Can the suit be maintained? *Why?* *yes.*

*(Equity) -> Bird v. Black 5 La. Ann. 189 - 1850. Hensley v. Hennis 42 Atlantic Reporter 807 - 189.*

24. H. and W. were husband and wife. P. sued them jointly in replevin for sheep alleged to have been wrongfully taken and detained by them; there was some evidence to show that the wife W. claimed the sheep, and was the active party in taking them. The defendant's asked the judge to charge the jury that if the taking and detention were by H & W. jointly, or by W. in the presence of H., the verdict must be for the defendants, or at least the husband alone could be held guilty. The court refused to so charge, and there was a judgment for P. Was there error? *No* Why?

*51 Me. 308 - 1869.*

25. D. was the husband of W; she in the absence of D. and without his consent or sanction, falsely slandered P., who sued D., for the damage. The statute at the time provided that the wife should be personally liable for her torts, that the husband should not be liable for any tort of the wife in her carrying on any separate business or trade, but that nothing in this legislation should be construed as exempting a husband from liability for the torts of the wife. Was D. liable? *yes* Why?

*M. T. R. 4 N. W. Reporter (Minn) 412 - 1892*

26. H. was the husband of D. who was the owner of certain property, which D. authorized her husband H. to sell for her. In doing this, H. made false and fraudulent representations whereby the purchaser P. was damaged. P. sued D. without joining the husband. The statute provided that a married woman may sue and be sued in all matters having relation to her sole and separate property, the same as if she were sole. Was the suit properly brought? *yes* Why?

*3 V. M. 47 N. 1. 571 - 189*

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. The letter is signed by Abraham Lincoln and is addressed to the Senate and House of Representatives. The letter discusses the state of the Union and the progress of the war against the Confederacy.

The President's message to Congress, January 3, 1862, is a significant document in the history of the United States. It outlines the challenges facing the nation during the Civil War and provides a detailed account of the administration's policies and actions. The message is a testament to Lincoln's leadership and his commitment to the preservation of the Union.

The President's message to Congress, January 3, 1862, is a significant document in the history of the United States. It outlines the challenges facing the nation during the Civil War and provides a detailed account of the administration's policies and actions. The message is a testament to Lincoln's leadership and his commitment to the preservation of the Union.

The President's message to Congress, January 3, 1862, is a significant document in the history of the United States. It outlines the challenges facing the nation during the Civil War and provides a detailed account of the administration's policies and actions. The message is a testament to Lincoln's leadership and his commitment to the preservation of the Union.

The President's message to Congress, January 3, 1862, is a significant document in the history of the United States. It outlines the challenges facing the nation during the Civil War and provides a detailed account of the administration's policies and actions. The message is a testament to Lincoln's leadership and his commitment to the preservation of the Union.

The President's message to Congress, January 3, 1862, is a significant document in the history of the United States. It outlines the challenges facing the nation during the Civil War and provides a detailed account of the administration's policies and actions. The message is a testament to Lincoln's leadership and his commitment to the preservation of the Union.

27. H. and W. were husband and wife; they were sued jointly by P. for alleged slanderous words falsely spoken by W. the wife, without the presence and consent of H., the husband, of and concerning P. A verdict was rendered for P., which was set aside, and the complaint was dismissed as against the husband. The statute at the time provided that "in an action or special proceeding a married woman appears, prosecutes or defends, alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property." Was there error in setting aside the verdict, and dismissing the complaint as to H.? *yes. Why?*

*33 Hun (N. Y.) 652 - 1884*

28. H. and W. were husband and wife. When H. was not present, and without his consent or participation in any way W. falsely slandered P. to his damage. P. sued W. without joining H. The statute provided that "all her separate property,--real and personal, choses in action and earnings,--is under her sole control, to be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried," and she could sue for the same in her own name free from the interference of her husband. Was the suit properly brought? *yes. Why?*

*M. & R. 65 Del. 129. - 1872*

*Weight of authority against decision*

29. D. and P. had been husband and wife, but at the time of suit had been divorced. During the marriage, and while they were living together, D. grossly and seriously assaulted and injured P., the wife without cause. After the divorce P. sued D. for the damage suffered by her. The statute at the time provided that "the real and personal estate of every female, acquired before marriage, and all property real and personal, to which she may afterward become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female. Actions may be brought by and against a married woman in relation to her sole property in the same manner as if she were unmarried." Should she recover damages from D.? *no. Why?*

*B. T. Amfield 117 Mich 80 - 1898.*

30. D(1) and P. were husband and wife. D(1) and D(2) jointly and without excuse carried P. to an insane asylum, and there confined her for a considerable time. Afterward P. obtained a divorce from D(1) and then sued D(1) & D(2) for the damages arising from the imprisonment in the asylum. Is she entitled

[illegible]

to judgment against either or both D(1) and D(2), there being no special statute affecting the matter? *no*. Why?

*neither liable. A. & A. 67 Me. 304 - 1877*

31. P. sued D. a banking corporation in trover for three promissory notes each for 100 pounds. The bank pleaded the general issue; a verdict was given for P., whereupon D. moved in arrest of judgment on the ground that an action of trover would not lie against a corporation. Should the motion be granted? *no*. Why?

~~*67 Me. 304 - 1877*~~  
*16 East p. 6 - 1812*

32. P. was the owner of certain barges loaded with coal; they were wrongfully seized by the agent of D. a canal company, for tolls claimed to be due by P. The agent of D. acted within the scope of his authority. P. sued D. in trespass for breaking and entering locks on the canal, and seizing and carrying away barges and coal. P. pleaded not guilty. The only question raised was whether trespass would lie against a corporation. A verdict was given to P. Was this error? *no*. Why?

*4 Man + Gr. 462, 1842*

33. P. brought an action on the case against D. a turnpike company, for stopping a water course, and got a verdict for \$305. It was moved to arrest judgment on the ground that such an action could not be maintained against a corporation. Should the motion be sustained or overruled? Why? *Overruled.*

*Est. 4 Berq. & R. (Penna) 6 - 1818*

34. P. sued D. a railroad Company, and R. its agents in trespass for an assault and imprisonment, alleged to have been done by R. in attempting to enforce certain regulations of the company as to the delivery of tickets and payment of fares. A verdict was rendered for P. which it was moved to set aside on the ground that a corporation could not be held for an assault. Should the motion be allowed? *no*. Why?

*6 Echo. 319 - 1851*

35. P. sued D. a R. R. Co. for the publication of a libel. D. pleaded the general issue. The evidence showed that the directors of D. made an investigation as to P's qualities; in the course of this investigation the president of D. wrote to an architect requesting his opinion of P.; his reply was very depreciative of P. The testimony taken, including the letter of the architect was printed in two volumes, and these were distributed among the members of the company. The statements, especially in the letters were false. A verdict was given for P. which D. contended was erroneous on the ground that a corporation was not liable for libel. Is that correct? *no*. Why?

*21 Howard (U. S.) 202 - 1858*

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

08-11-1964  
10-11-1964  
12-11-1964  
14-11-1964  
16-11-1964  
18-11-1964  
20-11-1964  
22-11-1964  
24-11-1964  
26-11-1964  
28-11-1964  
30-11-1964  
01-12-1964  
03-12-1964  
05-12-1964  
07-12-1964  
09-12-1964  
11-12-1964  
13-12-1964  
15-12-1964  
17-12-1964  
19-12-1964  
21-12-1964  
23-12-1964  
25-12-1964  
27-12-1964  
29-12-1964  
31-12-1964  
01-01-1965  
03-01-1965  
05-01-1965  
07-01-1965  
09-01-1965  
11-01-1965  
13-01-1965  
15-01-1965  
17-01-1965  
19-01-1965  
21-01-1965  
23-01-1965  
25-01-1965  
27-01-1965  
29-01-1965  
31-01-1965  
02-02-1965  
04-02-1965  
06-02-1965  
08-02-1965  
10-02-1965  
12-02-1965  
14-02-1965  
16-02-1965  
18-02-1965  
20-02-1965  
22-02-1965  
24-02-1965  
26-02-1965  
28-02-1965  
01-03-1965  
03-03-1965  
05-03-1965  
07-03-1965  
09-03-1965  
11-03-1965  
13-03-1965  
15-03-1965  
17-03-1965  
19-03-1965  
21-03-1965  
23-03-1965  
25-03-1965  
27-03-1965  
29-03-1965  
31-03-1965  
02-04-1965  
04-04-1965  
06-04-1965  
08-04-1965  
10-04-1965  
12-04-1965  
14-04-1965  
16-04-1965  
18-04-1965  
20-04-1965  
22-04-1965  
24-04-1965  
26-04-1965  
28-04-1965  
30-04-1965  
02-05-1965  
04-05-1965  
06-05-1965  
08-05-1965  
10-05-1965  
12-05-1965  
14-05-1965  
16-05-1965  
18-05-1965  
20-05-1965  
22-05-1965  
24-05-1965  
26-05-1965  
28-05-1965  
30-05-1965  
31-05-1965  
01-06-1965  
03-06-1965  
05-06-1965  
07-06-1965  
09-06-1965  
11-06-1965  
13-06-1965  
15-06-1965  
17-06-1965  
19-06-1965  
21-06-1965  
23-06-1965  
25-06-1965  
27-06-1965  
29-06-1965  
01-07-1965  
03-07-1965  
05-07-1965  
07-07-1965  
09-07-1965  
11-07-1965  
13-07-1965  
15-07-1965  
17-07-1965  
19-07-1965  
21-07-1965  
23-07-1965  
25-07-1965  
27-07-1965  
29-07-1965  
31-07-1965  
02-08-1965  
04-08-1965  
06-08-1965  
08-08-1965  
10-08-1965  
12-08-1965  
14-08-1965  
16-08-1965  
18-08-1965  
20-08-1965  
22-08-1965  
24-08-1965  
26-08-1965  
28-08-1965  
30-08-1965  
31-08-1965  
01-09-1965  
03-09-1965  
05-09-1965  
07-09-1965  
09-09-1965  
11-09-1965  
13-09-1965  
15-09-1965  
17-09-1965  
19-09-1965  
21-09-1965  
23-09-1965  
25-09-1965  
27-09-1965  
29-09-1965  
30-09-1965  
01-10-1965  
03-10-1965  
05-10-1965  
07-10-1965  
09-10-1965  
11-10-1965  
13-10-1965  
15-10-1965  
17-10-1965  
19-10-1965  
21-10-1965  
23-10-1965  
25-10-1965  
27-10-1965  
29-10-1965  
31-10-1965  
01-11-1965  
03-11-1965  
05-11-1965  
07-11-1965  
09-11-1965  
11-11-1965  
13-11-1965  
15-11-1965  
17-11-1965  
19-11-1965  
21-11-1965  
23-11-1965  
25-11-1965  
27-11-1965  
29-11-1965  
30-11-1965  
01-12-1965  
03-12-1965  
05-12-1965  
07-12-1965  
09-12-1965  
11-12-1965  
13-12-1965  
15-12-1965  
17-12-1965  
19-12-1965  
21-12-1965  
23-12-1965  
25-12-1965  
27-12-1965  
29-12-1965  
31-12-1965  
01-01-1966  
03-01-1966  
05-01-1966  
07-01-1966  
09-01-1966  
11-01-1966  
13-01-1966  
15-01-1966  
17-01-1966  
19-01-1966  
21-01-1966  
23-01-1966  
25-01-1966  
27-01-1966  
29-01-1966  
31-01-1966  
02-02-1966  
04-02-1966  
06-02-1966  
08-02-1966  
10-02-1966  
12-02-1966  
14-02-1966  
16-02-1966  
18-02-1966  
20-02-1966  
22-02-1966  
24-02-1966  
26-02-1966  
28-02-1966  
01-03-1966  
03-03-1966  
05-03-1966  
07-03-1966  
09-03-1966  
11-03-1966  
13-03-1966  
15-03-1966  
17-03-1966  
19-03-1966  
21-03-1966  
23-03-1966  
25-03-1966  
27-03-1966  
29-03-1966  
31-03-1966  
02-04-1966  
04-04-1966  
06-04-1966  
08-04-1966  
10-04-1966  
12-04-1966  
14-04-1966  
16-04-1966  
18-04-1966  
20-04-1966  
22-04-1966  
24-04-1966  
26-04-1966  
28-04-1966  
30-04-1966  
02-05-1966  
04-05-1966  
06-05-1966  
08-05-1966  
10-05-1966  
12-05-1966  
14-05-1966  
16-05-1966  
18-05-1966  
20-05-1966  
22-05-1966  
24-05-1966  
26-05-1966  
28-05-1966  
30-05-1966  
31-05-1966  
01-06-1966  
03-06-1966  
05-06-1966  
07-06-1966  
09-06-1966  
11-06-1966  
13-06-1966  
15-06-1966  
17-06-1966  
19-06-1966  
21-06-1966  
23-06-1966  
25-06-1966  
27-06-1966  
29-06-1966  
01-07-1966  
03-07-1966  
05-07-1966  
07-07-1966  
09-07-1966  
11-07-1966  
13-07-1966  
15-07-1966  
17-07-1966  
19-07-1966  
21-07-1966  
23-07-1966  
25-07-1966  
27-07-1966  
29-07-1966  
31-07-1966  
02-08-1966  
04-08-1966  
06-08-1966  
08-08-1966  
10-08-1966  
12-08-1966  
14-08-1966  
16-08-1966  
18-08-1966  
20-08-1966  
22-08-1966  
24-08-1966  
26-08-1966  
28-08-1966  
30-08-1966  
31-08-1966  
01-09-1966  
03

1. The first step in the process of the investigation is to determine the scope of the problem. This involves identifying the specific area of concern and the objectives of the study. The next step is to gather information about the problem, which may involve reviewing existing literature, conducting interviews, or performing a preliminary survey. Once the scope and objectives are established, the next step is to design the study. This involves determining the research methods, data collection techniques, and analysis procedures. The final step is to conduct the study and report the findings. This involves collecting data, analyzing it, and presenting the results in a clear and concise manner.

1. The first of these is the fact that the  
2. Government has been unable to secure the  
3. necessary funds to carry out its policy.  
4. This is due to the fact that the  
5. Government has been unable to secure the  
6. necessary funds to carry out its policy.  
7. This is due to the fact that the  
8. Government has been unable to secure the  
9. necessary funds to carry out its policy.  
10. This is due to the fact that the  
11. Government has been unable to secure the  
12. necessary funds to carry out its policy.

36. P. was a passenger upon a ferry boat, and was injured through the negligence of a ferryman in managing the boat. The boat was owned by D., an educational corporation, which without any authority to do so, had engaged in the ferry business, by purchasing boats and hiring servants to manage them. At the trial the justice ruled there was no evidence to warrant a finding for the plaintiff, and directed a verdict for the defendant,--- this being on the ground that since the corporation had no authority to engage in such business and so could not be liable for acts done in carrying it on. Was this correct? *no*. Why? *(either in 76 H.5)*

*160 Mass. 177 - 1893.*

37. D. a municipal corporation allows its drains and sewers to fall out of repair, become clogged, and cause surface water to settle and become a pond on P's lot, thereby rendering it less valuable for use and occupation. P. sues for the damages. Can he recover? *yes*. Why?

*103 Ga. 233 - 1897.*

38. P. while passing through the streets of D. a municipal corporation, without fault on his part, by, through and because of the negligence of the servant of D. a mule attached to one of the garbage carts of D. was permitted to run away and run over P. and severely injure him. The driver of the mule was a small boy employed by the health board of the city to remove the refuse accumulations upon the street. At the trial a verdict was directed to be rendered for D. Was this error? *no*. Why?

*Low v. Atlantic 95 Ga. 129 - 1894.*

39. The under side of the iron grate which covered the coal hole in a street belonging to D., and the stone ledge upon which it was placed became so worn that when P. stepped upon the grate it slipped out of place and P. was thrown down through the hole and seriously hurt. The court was asked to charge that the city was not bound to examine it in order to ascertain its condition, and notice of its condition could not be implied if the defect could not be seen without removing the cover. This was refused. Was there error? *yes*. Why?

*Duncan v. Philadel. 178 Penna. State. 350*

40. P. was a fire insurance company which had insured A's property within the water and fire protection limits within the city of D., a municipal corporation, for a less premium than it would have charged for a like insurance outside of those limits. A's property was burned, and P. had to pay for it. P. then sued D. alleging that D. had wrongfully and negligently allowed its water works, pumps, pipes, and fire appliances to become out of





stopped with mud etc., and unfit for use, to such an extent that the water could not be thrown upon the house and put out the very slight fire that had started upon the arrival of the fire department. D. demurred to the complaint. Should it be sustained or overruled? Why?

*Sustained.*

148 N. Y. 46. — 1895

41. P's complaint charged that D. a municipal corporation was the owner of a system of water works consisting of pipes laid in the ground, conducting water to the dwellings of residents in the city, for which it received compensation. The immediate management and direction of the water works were vested in a board of water commissioners originally named in the act authorizing the creation of the water works system, but afterwards to be appointed by the mayor and alderman. In laying the pipes, the work was so badly done as to leave ridges in the street over the pipes, and by reason of such ridges in the street over the pipes P. while careful herself, was thrown from her carriage and was hurt. She sued D. Is she entitled to recover? No. Why?

68 N. H. 586 — 1895

42. P. sued D. a municipal corporation, for personal injuries arising from the discharge by private persons of fire arms, squibs, rockets, and fireworks at a narrow place in one of D's streets, which acts were alleged to have been by the written consent of the mayor, and with the knowledge of the city council and police and other officers of the town; that the acts amounted to a public nuisance which caused P's team to run away, throw him from his carriage and severely injure him. D. demurred. Should the demurrer be sustained or overruled? Why?

*Sustained.* B. V. C. 45 W. Va. 393 — 1898.

43. P. an electric light company, by a license from D. a municipal corporation, had its wires strung on poles part of which belonged to the city, and for which an annual rental was paid. The city itself was engaged in the electric lighting business. The mayor with a force of workmen tore down P's wires from the city's poles. It was shown that the council did not authorize this to be done, but after it had been done, the city authorized the bringing of a suit to enjoin P. from putting its wires up again, as P. claimed it had a right to do. P. sued D. for the damages. Is it entitled to recover? Why?

G. E. L. & C. Co. v T. 20 Wash 268.

44. The mayor of D. a municipal corporation appointed a man of a vicious character as special policeman to keep a street from obstruction. While in the performance of his duties, but without

After the first trial, the jury was told that the defendant was not guilty. The jury then returned a verdict of not guilty. The judge then announced that the defendant was free to go. The defendant then left the courtroom. The judge then dismissed the jury. The trial was over.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

[illegible]

1. In 1944, the first year of the war, the  
2. number of people working in the defense industry  
3. was 1,000,000. In 1945, the number was 1,500,000.

cause, he committed an assault on P., for which P. sued D. Is D. liable? *no. Why?*

*180 Ill. 154.*

45. D. a municipal corporation owns and operates a gravel bank, which is a dangerous place. It gives no notice of warning to the laborers at such bank, and from the falling of the bank, P. one of these while working there, is seriously hurt. He sued D.

Is D. liable? *yes. Why?*

*City of W. v. Peeden. 57 Pacific Reporter 131-187*

46. P. was seriously hurt by the breaking down of a defective bridge, which was under the care and control of the commissioners of D. county a public quasi corporation. The county commissioners were negligent in looking after this bridge. P. sued D. Can he recover? *no. Why?*

*Heigel v. Wichita Co. 84 Texas 392.—1892.*

-----

... of ... ..  
... ..

... ..  
... ..  
... ..  
... ..  
... ..

... ..  
... ..  
... ..  
... ..  
... ..

## CHAPTER XIX.

Nuisance.I. Definitions:

Nuisance is very difficult to define, and it has been said that "the most that can be said for any definition of nuisance is that it is not so objectionable as many others".

2 Jaggard Torts p.744.

It has been defined as a "civil wrong, consisting of anything wrongfully done or permitted which interferes with or annoys another in the enjoyment of his legal rights".

2 Jaggard Torts, p.744. Cooley, p.670;

Definitions are sometimes given in statutes to the effect "that a nuisance is anything injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with comfortable enjoyment of property." 2 Jaggard, Note p.744.

A nuisance may be said to be any unreasonable or unwarrantable act or omission that endangers or invades the personal comfort, safety or health of another, or annoys him in the enjoyment of his property.

Mere annoyances arising wholly from the course of nature, without the fault or participation of any person, are not nuisances, - though the state on behalf of the public may provide for their termination or removal. Cooley 671.

Nuisance differs from trespass on the one hand, in that the latter is a forcible and direct invasion of the rights of another, while a nuisance is generally injurious only in its consequences or results. There are, however, some acts, which can be treated either as trespass or nuisance, - as the overhanging limbs of trees, - these can be considered either as directly invading and breaking the close of the adjoining owner, or as being indirectly injurious in their consequences only. Other causes of small but continuing trespasses are of like character. Cooley 672. Hale 419. Jaggard 745.

Nuisance is also different from negligence, in that the latter is a failure to use care to prevent damage, while

19. 10. 1944

5. 2. 1. 4.

PROBATION DEPARTMENT

• 157 •

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863. It is a very long letter, and it contains a great deal of information about the state of the country at that time.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
DATE 08-19-2006 BY 60322 UCBAW/SJS

[illegible]

1. The Commission has received information from the  
Ministry of the Interior, Department of the Interior,  
that the following persons have been arrested in  
the last few days:

SUBJECT: [REDACTED] DATE OF BIRTH: [REDACTED]

nuisance is the annoyance resulting from the acts or omissions of the defendant, by whatever fault of the latter caused. In fact, in many cases the wrongful act may be considered as being negligent, or willful, or the wrong resulting therefrom being a nuisance. Jaggard 747.

II. The annoyance may arise from either or both -

- (a) The use, management, custody or control of one's property; or
- (b) Personal misconduct, such as indecent exposures, singing of ribald songs, swearing, etc. Jaggard 768.

III. Classes of nuisances:

1. As to persons affected by them, nuisances are -

- (a) Public or common, - an unlawful act or omission, which endangers the lives, safety, health, property or comfort of all, or some considerable portion of, the public alike, or by which the latter are obstructed in the exercise of any right common to all. Pollack 487. It is a public wrong for which the party responsible is indictable and punishable criminally. It does not necessarily invade the right of any particular person more than that of another person, though it may do so, - when as to him a civil cause of action exists also.
- (b) Private, - such an annoyance as affects only one person, or a determinable number of persons, and gives the right to maintain a civil action for damages. Pollock Ch.X.p.485; Cooley, 730; Jaggard, 782.

Tests, - It is very difficult to distinguish in all cases what is wholly a public nuisance, and on the other hand what is purely private. The following tests have been suggested:

- 1. Indictability, - and this is usually a matter of positive statutory provision, though the definition in many cases depends on the common law. Jaggard, 782.
- 2. Possibility of affecting or annoying the public in its rights, and not the number of persons actually affected. 16 Am. & E. Enc. 931.
- 3. Place, - A public nuisance must be in

university in the United States  
and other countries.

the following information has  
been obtained from the records

(a) The following information  
has been obtained from the records

(b) The following information  
has been obtained from the records

(c) The following information  
has been obtained from the records

(d) The following information  
has been obtained from the records

(e) The following information  
has been obtained from the records

(f) The following information  
has been obtained from the records

(g) The following information  
has been obtained from the records

(h) The following information  
has been obtained from the records

(i) The following information  
has been obtained from the records

(j) The following information  
has been obtained from the records

(k) The following information  
has been obtained from the records

(l) The following information  
has been obtained from the records

(m) The following information  
has been obtained from the records



a public place, or where the public frequently congregate, or where numbers of the public are likely to come within the range of ~~the~~ its influence. 16 Am. & E. Enc. 927;

- (c) Mixed, - those that are both public and private; they produce injury to many or all the public, and at the same time a special and particular injury to private rights; thereby making the wrongdoer liable to indictment and punishment by the public, and to a suit for damages by the person injured. Wood, Nuisances 14; Jaggard 783.

2. As to the things affected, nuisances are

- (a) To real property, Cooley 672.

(1) Corporeal, by invading it or interfering with its use:

1. Overhanging buildings and trees, Cooley 672.
2. Filthy percolations, Cooley 672.
3. Percolating waters, Cooley 673.
4. Deposits on land, Cooley 675.
5. Leakage from pipes, Cooley 676.
6. Bursting of reservoirs, Cooley 676.
7. Falling waters and snows, Cooley 681.
8. Fires, Cooley, 700.
9. Explosives, Cooley 705.

(2) Incorporeal, - interference with easements, &c.

1. Interfering with the flow and condition of waters. Cooley 682-706.

2. Interfering with support. Cooley 706-708

- (b) To personal property, &c., - Diseased beasts, &c. Cooley 724.

- (c) Persons, causing them personal discomfort, or endangering their safety.

1. Noise, dust, smoke, odors, &c. Cooley 708-16.
2. Mental disquietude, Cooley 716.
3. Invitation into dangerous places. Cooley 718.
4. Things which threaten calamity. Cooley 722.

These are to be considered:

In the early law a private nuisance was limited to injuries done to a man's freehold, - or as Blackstone says "anything done to the hurt or annoyance of the land, tenements or hereditaments of another", without justifiable excuse; the modern

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

100 100

cases do not so limit it, and there are now an "infinite variety of ways, in which one may be annoyed or impeded in the enjoyment of his rights." Pollock 491. Cooley 672.

#### To Corporeal Real Property:

1. Overhanging things,-- "If any part of one's building, though it be only an upper bay window", or part of the roof, or the eaves, or though the limbs of trees near the line, extend over the neighbor's line, though no damage is done or anticipated, it is a nuisance for which an action lies, or which the neighbor has a right to abate. Cooley 672.
2. Filthy percolations, through the soil coming from deposits on a neighbor's land, whether they are due to negligence or not, are nuisances when they injure the well, cellar, or any other part of the adjoining premises. Cooley 673.
3. Percolating waters, which drown, or render the land of a neighbor unproductive, or which weaken or make damp and unhealthy, the walls of his buildings, resulting from throwing the water upon adjoining land in such a place and way as to cause such harm, become nuisances to such property. Cooley 674-5.
4. Deposits upon land,-- if made directly upon the land, are trespasses; but for one to do any act off the estate which shall cause anything to be carried or thrown upon it is a nuisance; such as depositing refuse, sand, earth, &c. into streams where they will be carried on to the land of another and deposited there, whether under water or not. Cooley 676.
5. Leakage from water pipes,-- if injuries result from these causes when the pipes are in the lawful use of another, it seems that liability depends only on negligence, and not otherwise. Cooley 672.
6. Bursting of reservoirs,-- In the leading English case of Rylands vs. Fletcher, it was held that a party bringing and storing a large body of water upon his own land in an artificial reservoir, "which injures another by breaking away in consequence of original defects, of which he was ignorant, is responsible for the injury, though chargeable with no negligence",-- "if he collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril".

...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...

In the later case of *Nichols vs. Marsland*, it was held, however, if the breaking was due to the act of God, or of an independent third person, for which the defendant was in no way responsible, there would be no liability. The American rule, however, seems to plant the liability on the ground of negligence only, either in the construction or subsequent attention. Cooley 676-681.

7. Falling waters and snows: While one has a right to protect his own premises against the fall of rain or snow, yet he owes the duty to his neighbor to use care not to harm him. If therefore he constructs his building so as to cast water therefrom upon the land of his neighbor, he commits an actionable wrong; but if he puts proper eave troughs upon his buildings, and keeps them in proper order, without negligence, he is not liable. Cooley 681.
8. Fires: So common law it was the duty to keep fire upon one's own premises, - it being a dangerous element, it was the duty to keep it at one's peril, - and liability attached whether its escape was due to negligence or not. Pollock 616. Jaggard 840. The statute of Anne, 6 Anne c.31, Sec.67, charged this as to domestic fires; and now generally the liability is based only on negligence; it being dangerous, due care means a high degree of care to prevent harm. "The gist of the action is negligence and if that exists in either of these particulars", - in time, manner and attention - "and injury results in consequence thereof, the liability attaches, whether the proof establishes gross negligence or only want of ordinary care." Cooley 701.

Fires communicated by machinery: Liability here is based on negligence also; "but it is negligence if those employing such machinery fail to make use of approved appliances for arresting sparks, or if the machinery by reason of being unsuitable or out of order, is likely to scatter fire."

In some cases, as in the use of railroad engines, the fact of a fire is prima facie evidence of negligence, and will be sufficient, if the company can not show care to prevent such a result. Cooley 702-3.

The same rule has also been applied, though not generally, to explosions of boilers. Cooley 704.

It is negligence also in railroad companies to leave dry grass and material where they are liable to take



fire,- the duty here to use care being on the company and not on the land owner. Cooley 703.

9. Fire arms and Explosives, - Liability here is based on negligence,- but the use being dangerous the care must be proportioned accordingly. Cooley 705.

## To Incorporeal Real Property.

### I. Interfering with the flow and condition of waters:

Waters may be classified into

#### 1. Surface, which are

(a) Sheet waters, not flowing in streams.

(b) Stream,- flowing in channels or water courses.

#### 2. Subterranean,- those below the surface, and these are

(a) Percolating,-not flowing in streams or defined channels.

(b) Veins or channels,-in known and defined courses.

As to the flow of surface waters,-

- (a) Sheet waters, not flowing in defined channels, the general rule is that he upon whose land it falls has a right to keep it if he chooses,- so "if the lower proprietor is deprived of the benefit of the natural flow, he has no remedy." Cooley 682. So, too, on the other hand, by the common law, one on whose land it falls has no right to have it run off over the land of the lower adjoining owner,- hence he may by barriers ward it off even though it is made to flow upon the land of his neighbors, to his loss. Cooley 683-4. The Civil law, however, gave the owner of the higher ground an easement to have the water flow off upon the lower ground in the natural way,- but denied the right of the lower owner to have it come if he needed it. This rule is applied in some of the states. Cooley 384.

Still another rule, applied in a few states, recognizes cross easements in the owners of the adjoining premises, whereby one has the right to have the surface water go, and the other the right to have the water come, on the land that lies at the lower level.

In regard to drains, either party has a right to gather the water that falls upon his own land into drains, and turn them into a natural stream passing through his land, and that of ad-





joining proprietors, though the lower proprietor is injured by the increased flow. Cooley 682-5.

But this right does not include the right to collect and discharge in increased quantities at any other place, whereby the waters are thrown upon the land of another in an unnatural way.

(b) Stream waters, - that flowing in a definite channel, having a bed, sides and banks, and usually discharging itself into another stream or body of water. The general rule here is that the lower proprietor has a right to have the water come in its natural way, substantially undiminished in quantity, and unhurt in quality, from the proprietor above; and on the other hand the upper proprietor has a right to have it go on without obstruction. More particularly,

(1) Nature of the rights. The rights are not rights to the water, but to the use of it as a stream, and the whole of it, in its natural state, either between adjacent owners on opposite sides, or between upper and lower proprietors. Cooley 691.

(2) Appropriation. There can be, at common law, no exclusive rights acquired by prior appropriation; this rule is by statute or custom modified to some extent in the mining states, or those where irrigation is necessary. Cooley 690.

(3) Diversion. Any proprietor has a right to divert the stream upon his own land, provided he returns it into the natural channel so as not to injure the lower proprietors. Cooley 692.

(4) Detention. As a general rule, each proprietor is entitled to the steady flow, yet it is not unlawful to gather it into reservoirs, for a useful purpose in good faith, and without unreasonable interference with the lower proprietors. Cooley 693.

(5) Diminution. The right to use the water for domestic purposes, - for the family wants and for domestic animals, - and for irrigating and manufacturing, - if it does not essentially diminish the volume, is clearly re-

[illegible]

cognized. And it has been said that one may for the use of his family and his stock, use it all if necessary. This is doubtful, and it is not allowed in other cases.

Cooley 695. 23 Am. & E. Enc. 953

But what is a reasonable use depends in a large measure upon general or local customs. Cooley 693.

- (6) Fowling: The general rule is that the proprietor has the right to have the stream come in its natural state, not absolutely so, but substantially so, unpolluted by any unreasonable use of another. "The reasonableness of the use must determine the right, and this must depend upon the extent of the detriment to proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream." Cooley 699.

But here, as above, what is reasonable is generally a question of fact, depending upon the circumstances and the customs of the country or locality.

- (7) Flooding: At common law, and yet without agreement to that effect, a lower proprietor has no right to throw water back upon an upper proprietor, - and to do so is actionable. Cooley 695.

In short, perhaps the general idea of the rights of riparian proprietors, adjacent, opposite, upper or lower, in the use of a flowing stream, are somewhat like those of tenants in common, - each having a right of use consistent with that of all the rest, but no further.

As to subterranean waters,

- (a) Percolating, - there is no right in these, or their exclusive use or appropriation, in one owner as compared with that of the adjacent owner, that gives a right of action for any interference, except through pollution. This rule applies also to the oil, and gas found below the surface. Cooley 689.



- (b) Veins or channels, when known, (but only when known to be flowing in defined channels) are subject to the rules applying to surface streams. Cooley 690.

2. Interfering with the right of support:

These are either

- (a) Lateral, or the right to have one's land supported by that adjacent to it. The rules here are

1. One owner of land has a right to have it supported in its natural condition by the adjacent land; and if this is interfered with by the adjacent owner whether negligently or not, an action lies. Cooley 706.
2. This obligation is limited to the support of the land itself, in its natural state, unweighted by buildings; in the latter case no liability arises from damages resulting from removal of support unless such removal would do damage if the building were not there; but when land is weighted with buildings there is a duty to use care not to injure them by carelessly removing support, without giving notice to their owner. Cooley 706-7. As stated in a syllabus to the leading case Hancock vs. Thurston, 12 Mass. 220, "the owner of a house built near the line has no action for damages done by an excavation made in the adjoining premises, where the damage would not have resulted but for the weight of the house".

- (b) Subjacent support, - Where one owns the surface and another the subsurface, the latter is bound to support the land above and all buildings then upon it. And it is sometimes stated "the land shall be supported, not merely in its original condition, but in a condition suitable to any of the ordinary uses necessary or incidental to its reasonable enjoyment." Cooley 707; Bigelow 252.

1940

1941

1942

1943

1944

1945

1946

1947

1948

1949

1950

1951

1952

1953

1954

1955

1956

1957

1958

1959

1960

1961

1962

1963

1964

1965

1966

1967

1968

1969

1970

1971

1972

1973

1974

1975

1976

1977

1978

1979

1980

1981

1982

1983

1984

On the other hand, Jaggard says the right extends only to the support of the land in its natural state, unburdened by buildings. Jaggard 753. A similar right exists as to the support of upper stories of buildings by the lower stories. Bigelow 252.

- (b) To personal property: "Domestic animals which have an infectious or contagious disease become a nuisance when the care and management of them by their owners is such as to expose the domestic animals of others to the infection or contagion; the liability is based on negligence or bad faith." Cooley 724.

(c) To Persons, -

I. Many of these are due to noise, jar of machinery, dust, smoke, odors, &c. The general rules applying here are

1. Malicious acts, - If the annoyance is wantonly caused by malice or wickedness, a slight degree of inconvenience will be sufficient to render it actionable. Cooley 708.

2. Useful employments, - In this case the liability depends upon the unreasonableness of the use. Here the following sub-rules apply:

(a) Every business should be carried on in a suitable and convenient place, and by convenient is meant not a place which may be convenient to the party himself, looking at his interest merely, but a place suitable and convenient when the interests of others are considered." Cooley 709.

(b) Trifling inconveniences must be submitted to, when that which is done in a useful employment, in point of locality is not unsuitable, and in point of management is not unreasonable." Cooley 710.

(c) The inconvenience, before it is actionable, must be such as to materially interfere with the physical comfort of human existence, not according to elegant, dainty, or fastidious modes of living, but to the plain and ordinary

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000



modes of life. Cooley 713.

- (d) it is, however, not necessary that the annoyance be actually injurious to health,- it is sufficient if the ordinary comfort and convenience of life be materially interfered with. Pollock 496.
- (e) The fact that another nuisance existed in the same place, or still continues, is no justification for setting up another. Pollock, 498.
- (f) Neither is it justified by showing the business was laudable, or otherwise innocent. Pollock, 499.
- (g) So, too, it makes no difference if the nuisance existed before the plaintiff became the owner or occupant, unless it has obtained a right to exist by prescription or public grant. Pollock 498; or as Judge Cooley puts it, "it is of no importance to the right of action that the plaintiff has come into the neighborhood since the nuisance was created",-Cooley 729-30. Or, as it is sometimes said, "moving to a nuisance" with knowledge of its existence does not disentitle the person so doing from complaining.

2. Mental disquietude alone, without any injury to property, health or person,-such as would result to all alike who would come within the influence of the acts complained of,- is not a cause of action for a nuisance. Cooley 716.
3. Invitation into dangerous places,- The owner of property upon which others are expressly or impliedly invited to enter must exercise ordinary care to keep the premises reasonably safe for the visit,- if injury results from lack of care, an action lies. But  
One is not invited simply because his entrance is not prevented,-there is no duty to protect a trespasser. The duty attaches to occupancy and control of property, and not to ownership alone, and hence belongs primarily to the tenant, unless the landlord assumes the duty. Cooley 718.



4. Things threatening calamity,—such as tottering buildings, storing of explosives, undertaking dangerous works near highways, without providing protection of passers-by,—the party endangered can sue before the calamity happens. Cooley 722.

IV. Who is responsible: Responsibility may exist either for

- (1) Creating,—Whoever creates or causes a nuisance is liable for the damage it does, though he creates it on the land of another, where he has no right to enter and abate it. Cooley 727.
- (2) Continuing,—Whoever knowingly allows a nuisance to continue upon property in his possession and control, though not created by him, becomes liable for the damage done — the continuance and every use of that which is in its erection a nuisance is a new nuisance. Cooley 724-727.
  - (a) As between landlord and tenant, the latter is presumptively liable after he has notice of the existence of such nuisance,—but in many cases or usually, when the nuisance exists when the tenancy commences the landlord remains liable; though it is said the landlord relieves himself from liability on account of defect in premises, if he exacts a covenant to repair from the tenant. Cooley 724-5.
  - (b) As between grantor and grantee, the grantee generally does not become liable until he has had notice of the existence of the nuisance.
  - (c) A mere agent or servant is not liable, unless the nuisance is due to his personal wrongful act or negligence. Cooley 729.

V. Who can complain:

- (1) General rule,—The party who at the time suffers the inconvenience can complain, whether he came into the neighborhood before or after the nuisance was created. The reasons for this rule are
  - (a) If the grantor could have complained, his grantee, unless for express purpose of litigation, can,—else the nuisance would practically destroy a man's right to his land by requiring him to sell it at a price the nuisance had assisted in establishing. Cooley 730.
  - (b) If the nuisance is wholly public,—no lapse of time can give it a right to exist as against the state.

[illegible]

• 1994 •

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

1. *Phragmites* (common)

$$K_1 = \frac{1}{2} \left( \frac{1}{\mu_1} + \frac{1}{\mu_2} \right) \left( \frac{1}{\mu_1} + \frac{1}{\mu_2} \right) \left( \frac{1}{\mu_1} + \frac{1}{\mu_2} \right)$$

**Abstract**

(c) So, too, if it is both public and private,-- that is, mixed,-- its long continued existence gives it no right as against the state, even though the state does not complain; and in this case any individual who newly comes into its influence, and is specially injured, in a way different from others, could object; in this way some individuals could, and others could not complain, if the prescriptive period had elapsed. So on the whole it seems that public nuisance that does special injury to individuals obtains no right by lapse of time to exist against any member of the public. Cooley 730-31.

(d) It is said that the right to complain in case of a private nuisance may be lost by the lapse of the prescriptive period. This is denied, however, on the ground that every day's repetition of a nuisance is a new nuisance. Cooley 730;738.

(2) Private injury from public nuisance: Rule,-

"Whenever one member of the public suffers some peculiar injury from a public nuisance, differing from that suffered by the community at large, he can maintain action". Cooley 736.

To do this, especially in the use of public easements, it is necessary for him to show

(a) That the easement exists.

(b) That he has been obstructed in its use.

In both of these cases a question arises as to what the state has authorized; for so far as public easements are concerned the state can create, or abandon them at any time, or authorize their obstruction, and private parties can not complain, unless some private right has been infringed. Whatever the state therefore has authorized in the obstruction of these easements, unless it also invade the private property rights of individuals, is lawful and can not be complained of.

Cooley 732-6.

VI. Remedy: The remedies are

- (1) Abatement by act of the party in removing it or the cause of it, if it can be done without breach of the peace. It is only in case special damage is done that a private right to abate a public nuisance exists.

...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...

...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...

- (2) Injunction, - Courts of equity will enjoin the continuance of a nuisance when damages would be inadequate. But they act cautiously especially in interfering with useful and lawful employments.
- (3) Action for damages, - in the form of an action on the case. This is frequently granted when the harsher remedy by injunction would be denied.
- (4) Indictment, - the public remedy for a public nuisance - followed by an order of abatement.

VII. Municipal corporations: These are

- (1) Incorporated by charter granted from the state, or organized under a general law providing for their incorporation. This clothes them with the capacity of acting especially in the ownership and control of property as individuals, and of performing many other functions, - as cities and villages.
- (2) Public-quasi-corporations, - those that are not incorporated by the grant of a charter, but have some of the functions and powers of corporations conferred upon them, such as contracting, suing and being sued; - as townships & counties.

As to these (especially cities and villages) they are to be considered

- (a) As parts of the governmental machinery of the state, legislating for their people.
- (b) As corporate bodies, executing their own plans, and discharging the duties specially placed upon them by the state.
- (c) As artificial persons owning and managing property.

In the first two of these, (a) & (b), their functions are purely public, and for taking improper, or failing to take, action, they are not liable to individuals suffering.

In the third, (c), - if they are managing public property for a public purpose, - they are still discharging public functions; but if they are using their property for a

1. Subject                      Topic                      Author                      Date  
 2. How                      Why                      What                      Where

[illegible]

Y.O. 100-100-100-100

- 98 -

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

[illegible]

... the ... of ...

DATE: 11/15/50

[illegible]

did not have access to the animal

Q. Now, you're going to tell me that the defendant was not in the car at the time of the shooting, is that correct?

Journal of Management Inquiry 20(4) 403-419

[illegible][illegible][illegible][illegible][illegible]
$$n(\frac{1}{n+1}, \frac{1}{n+1}, \frac{1}{n+1}) = \frac{1}{n+1} \quad \text{and} \quad n(\frac{1}{n+1}, \frac{1}{n+1}, \frac{1}{n+1}) = \frac{1}{n+1}.$$

1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 26

[illegible]

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

000000

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

1992

... ..

DATE: 10/10/2013

... the  $\text{CO}_2$  concentration in the atmosphere is increasing, and the rate of increase is accelerating. The concentration of  $\text{CO}_2$  in the atmosphere is now about 380 ppm, and is expected to reach 550 ppm by the year 2100. The rate of increase is now about 0.5 ppm per year, and is expected to reach 1.5 ppm per year by the year 2100. The concentration of  $\text{CO}_2$  in the atmosphere is now about 380 ppm, and is expected to reach 550 ppm by the year 2100. The rate of increase is now about 0.5 ppm per year, and is expected to reach 1.5 ppm per year by the year 2100.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

[illegible]
$$\mathbb{R}^n \rightarrow \mathbb{R}^n, \quad (x, y) \mapsto (x, y) + \frac{1}{2} \left( \frac{\partial f}{\partial x}(x, y), \frac{\partial f}{\partial y}(x, y) \right)$$
$$T^2 = 34.5 \text{ sec} \quad (1) \quad \text{and} \quad \text{RMS} = 0.02 \text{ g} \quad (2) \quad \text{for } \sigma = 0.001 \text{ g}$$

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.



private purpose, they become liable as individual owners. Cooley 738-9.

Sub-rules here are

- (a) A public corporation is not liable for the failure of its officers to discharge properly and effectually their official duties. Cooley 740.
- (b) They are liable for failure to exercise due care in executing any work ordered by them- especially if for the particular benefit of its own people.
- (c) The duty to keep streets in repair in incorporated cities, where the whole control is left to the city, with the power to provide the means therefor, is considered a duty to private persons as well as public, and the city is liable for injuries due to negligence therein. Cooley 746.  
The same is true as to sewers, and sidewalks;- but not generally as to fire, water, health, and police departments.
- (d) The rule as to roads &c. in unincorporated counties and towns, in the absence of statutes, is different from that in cities, and they are not held liable for negligently failing to repair. Cooley 742.

But there is now generally a statutory liability imposed.

:

... ..

[illegible]

1960-1961 年 10 月 1 日 至 1961 年 9 月 30 日

• *Chlorophyll a* (Chl a) is the primary photosynthetic pigment in all photosynthetic organisms. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum. Chl a is found in the thylakoid membranes of chloroplasts in plants and in the plasma membrane of photosynthetic bacteria.

... ..

1. *Chlorophyll a* (Chl *a*)

1. 1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100	2101	2102	2103	2104	2105	2106	2107	2108	2109	2110	2111	2112	2113	2114	2115	2116	2117	2118	2119	2120	2121	2122	2123	2124	2125	2126	2127	2128	2129	2130	2131	2132	2133	2134	2135	2136	2137	2138	2139	2140	2141	2142	2143	2144	2145	2146	2147	2148	2149	2150	2151	2152	2153	2154	2155	2156	2157	2158	2159	2160	2161	2162	2163	2164	2165	2166	2167	2168	2169	2170	2171	2172	2173	2174	2175	2176	2177	2178	2179	2180	2181	2182	2183	2184	2185	2186	2187	2188	2189	2190	2191	2192	2193	2194	2195	2196	2197	2198	2199	2200	2201	2202	2203	2204	2205	2206	2207	2208	2209	2210	2211	2212	2213	2214	2215	2216	2217	2218	2219	2220	2221	2222	2223	2224	2225	2226	2227	2228	2229	2230	2231	2232	2233	2234	2235	2236	2237	2238	2239	2240	2241	2242	2243	2244	2245	2246	2247	2248	2249	2250	2251	2252	2253	2254	2255	2256	2257	2258	2259	2260	2261	2262	2263	2264	2265	2266	2267	2268	2269	2270	2271	2272	2273	2274	2275	2276	2277	2278	2279	2280	2281	2282	2283	2284	2285	2286	2287	2288	2289	2290	2291	2292	2293	2294	2295	2296	2297	2298	2299	2300	2301	2302	2303	2304	2305	2306	2307	2308	2309	2310	2311	2312	2313	2314	2315	2316	2317	2318	2319	2320	2321	2322	2323	2324	2325	2326	2327	2328	2329	2330	2331	2332	2333	2334	2335	2336	2337	2338	2339	2340	2341	2342	2343	2344	2345	2346	2347	2348	2349	2350	2351	2352	2353	2354	2355	2356	2357	2358	2359	2360	2361	2362	2363	2364	2365	2366	2367	2368	2369	2370	2371	2372	2373	2374	2375	2376	2377	2378	2379	2380	2381	2382	2383	2384	2385	2386	2387	2388	2389	2390	2391	2392	2393	2394	2395	2396	2397	23
---------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	----

*Journal of Management Studies*, 1987, Vol. 20, No. 6, pp. 611-624.

...the fact that the *Journal of the American Medical Association* is the largest medical journal in the world, and that it is the only one that is published by a medical association.

11. *Chrysomelidae* (10 spp.)

10716.00

CHAPTER XX.

---oOo---

NON-PERFORMANCE OF CONVENTIONAL AND STATUTORY DUTIES.

Nature of the rights: The rights involved here are usually brought existence by some contractual or conventional relation between the parties, whereby a specific obligation becomes imposed upon one of them to observe some special course of conduct as regards the person or property of the other. In addition to the contract between the parties, there is usually a placing of one's person or property into the hands of the other, in trust for some specified purpose; because of this placing of person or property into the trust of the other, and its acceptance, the law raises the duty to use care in the performance of the trust. Cooley 750.

The cases of this kind are those of

- 1. Bailments.
- 2. Innkeepers.
- 3. Common carriers: A, of freight; B, of persons.
- 4. Telegraph Companies.
- 5. Professional services.
- 6. Services requiring skill.

1. Bailment, - "is a delivery of goods in trust, upon an agreement express or implied, that the trust shall be duly exercised, and the goods returned when the purpose of the bailment is accomplished". Cooley 750. They are classed into those for the benefit of either (1) the bailor; (2) the bailee; or (3) both. The wrongs done are accomplished through negligence in the performance of the trust arising from the delivery of the thing bailed. This requires the definition of negligence.

(a) Negligence is "the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury." Cooley 752.  
Or, as has been very well defined elsewhere, "the inadvertent failure of a legally responsible person to use ordinary care under the circumstances, in observing or performing a non-contractual duty, implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." 16 Am. & E. Enc. 389.



(b) Degrees of negligence: It is usual to say that there are three degrees of care,- or three degrees of negligence corresponding to them, as follows:

1. Ordinary care or diligence. the want of which is ordinary negligence.
2. Extraordinary, or extreme, care or diligence, the want of which is slight negligence.
3. Slight care or diligence, the want of which is gross negligence.

Ordinary care is that which every person of common prudence ordinarily takes of his own concerns.

Extraordinary or extreme care is such as a very cautious and vigilant man would take of his own possessions.

Slight care, such as a man of common sense, however inattentive, would give to his own affairs.  
Cooley, 753.

(c) Rules: When the bailment is for the benefit of both bailor and bailee, the bailee must take ordinary care of the thing bailed, and is liable for ordinary negligence.

When for the benefit of the bailee only, then he owes a high degree of care, and is liable for slight negligence.

When for the benefit of the bailor only, then the bailee owes a duty of slight care only, and is liable only for gross negligence.  
Cooley 753.

It is doubtful if any benefit is derived from such a classification of care and negligence,- for the benefit of the bailor or bailee is only one of many circumstances going to make up the duty of the bailee. The care required will vary not only as to who is to be benefited, but also as the known danger increases, or with the value, or with other circumstances,- negligence always being a failure to use the care the circumstances, all of them, demand. Cooley 753.

A gratuitous bailee is liable only when the trust has been actually assumed, and not for not assuming it; and perhaps after it is assumed it can be surrendered if not injurious to the bailor; but dealing with the thing bailed in a way not contemplated is wrongful; there is no liability for



loss due to theft without fault of bailee.

Cooley 754.

Bailments for mutual benefit include such as

Pledge, the implied undertaking being to keep safely and return when the debt is paid.

Delivery of a thing to a mechanic, to be changed or repaired, the obligation being to use ordinary care and skill in the work, and return when finished.

Deposit of grain, usually with the privilege of mixing with other of like kind and quality, the obligation being to deliver an equal amount of like kind and quality on demand, and the duty being to use ordinary care. But in many cases of this kind the delivery amounts to a sale, in which case any loss whether from negligence or not is on the warehouseman. Cooley 755-7.

In all bailments there is the duty to keep within the terms of the bailment, and a departure therefrom usually amounts to a conversion.

2. Innkeepers: At common law his duties were

- (1) To furnish entertainment to travellers, without discrimination, if proper fees are tendered or secured, and the person is in proper condition, and there is room. Cooley 757.
- (2) He is also bound to protect him and his baggage as an insurer against loss by any cause other than the act of God or the public enemy, whether due to his own negligence or misconduct, or that of his servants, or of third persons, or from fires or thefts. Cooley 758.
- (3) The liability extends to the loss of luggage, clothes, money in the pocket or trunk, horses in the stable, or the cattle of the drover, and he can not relieve himself by posting notices that he will not be so liable. Cooley 760.
- (4) The contributory negligence of the guest in failing to exercise ordinary care for his own protection, will release the innkeeper. Cooley 761.
- (5) If he, through his servants, undertake to deliver baggage at stations, the liability continues until delivery. Cooley 761.





- (6) Lien,- he has a lien on the baggage for reasonable charges.
- (7) Guest,- the liability is to a guest, one who is a transient traveller, and not to a boarder who contracts for a definite stay at specific prices, nor to a mere visitor or caller.  
11 Am. & E. Enc. 17-18.

Note: These common law liabilities are now much modified by statutory provisions, allowing the innkeeper to limit his liability by giving various notices of reasonable regulations.  
Cooley 760.

### 3. Common carriers:

- (1) Definition, - "one who regularly undertakes, for hire, either on land or water to carry goods and passengers between different places, for such as offer", - and include railraw companies, express companies, stage coach proprietors, proprietors of boats and vessels plying on regular routes, wagoners, carmen; but not those who have no regular routes like draymen &c. Cooley 762.

#### A. Of freight: Rules, -

1. Common carriers may limit their employment to one or more classes of goods. Cooley 762.
2. Within the limits fixed he must receive and carry for all who offer, without partialty or discrimination, - but this does not forbid special bargains at special prices.  
Cooley 762-3.
3. The obligation assumed "is that he shall deliver at its destination the property received, without damage while in his hands, unless prevented by the act of God or the public enemy, and within a reasonable time.  
Cooley 763-5. An act of God is defined to be "disasters with which the agency of man has nothing to do, - a direct and violent act of nature", - negligence of the carrier concurring with an act of God leaves the carrier liable; accidental fires, explosions, strikes, &c. are not the acts of God, and do not relieve the carrier. But the unlawful act of strikers in the way of a mob or riot,

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

[illegible]

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

2. The second part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

3. The third part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

4. The fourth part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

5. The fifth part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

6. The sixth part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

7. The seventh part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

8. The eighth part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

9. The ninth part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

10. The tenth part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

THE UNIVERSITY OF CHICAGO

1. *Identify the main idea of the passage.*  
 2. *Identify the supporting details.*

and not "very good."

1. *Chlorophyll a* (Chl *a*)  
 2. *Chlorophyll b* (Chl *b*)  
 3. *Chlorophyll c* (Chl *c*)  
 4. *Chlorophyll d* (Chl *d*)  
 5. *Chlorophyll e* (Chl *e*)  
 6. *Chlorophyll f* (Chl *f*)  
 7. *Chlorophyll g* (Chl *g*)  
 8. *Chlorophyll h* (Chl *h*)  
 9. *Chlorophyll i* (Chl *i*)  
 10. *Chlorophyll j* (Chl *j*)  
 11. *Chlorophyll k* (Chl *k*)  
 12. *Chlorophyll l* (Chl *l*)  
 13. *Chlorophyll m* (Chl *m*)  
 14. *Chlorophyll n* (Chl *n*)  
 15. *Chlorophyll o* (Chl *o*)  
 16. *Chlorophyll p* (Chl *p*)  
 17. *Chlorophyll q* (Chl *q*)  
 18. *Chlorophyll r* (Chl *r*)  
 19. *Chlorophyll s* (Chl *s*)  
 20. *Chlorophyll t* (Chl *t*)  
 21. *Chlorophyll u* (Chl *u*)  
 22. *Chlorophyll v* (Chl *v*)  
 23. *Chlorophyll w* (Chl *w*)  
 24. *Chlorophyll x* (Chl *x*)  
 25. *Chlorophyll y* (Chl *y*)  
 26. *Chlorophyll z* (Chl *z*)  
 27. *Chlorophyll aa* (Chl *aa*)  
 28. *Chlorophyll ab* (Chl *ab*)  
 29. *Chlorophyll ac* (Chl *ac*)  
 30. *Chlorophyll ad* (Chl *ad*)  
 31. *Chlorophyll ae* (Chl *ae*)  
 32. *Chlorophyll af* (Chl *af*)  
 33. *Chlorophyll ag* (Chl *ag*)  
 34. *Chlorophyll ah* (Chl *ah*)  
 35. *Chlorophyll ai* (Chl *ai*)  
 36. *Chlorophyll aj* (Chl *aj*)  
 37. *Chlorophyll ak* (Chl *ak*)  
 38. *Chlorophyll al* (Chl *al*)  
 39. *Chlorophyll am* (Chl *am*)  
 40. *Chlorophyll an* (Chl *an*)  
 41. *Chlorophyll ao* (Chl *ao*)  
 42. *Chlorophyll ap* (Chl *ap*)  
 43. *Chlorophyll aq* (Chl *aq*)  
 44. *Chlorophyll ar* (Chl *ar*)  
 45. *Chlorophyll as* (Chl *as*)  
 46. *Chlorophyll at* (Chl *at*)  
 47. *Chlorophyll au* (Chl *au*)  
 48. *Chlorophyll av* (Chl *av*)  
 49. *Chlorophyll aw* (Chl *aw*)  
 50. *Chlorophyll ax* (Chl *ax*)  
 51. *Chlorophyll ay* (Chl *ay*)  
 52. *Chlorophyll az* (Chl *az*)  
 53. *Chlorophyll aza* (Chl *aza*)  
 54. *Chlorophyll abz* (Chl *abz*)  
 55. *Chlorophyll acz* (Chl *acz*)  
 56. *Chlorophyll adz* (Chl *adz*)  
 57. *Chlorophyll aez* (Chl *aez*)  
 58. *Chlorophyll afz* (Chl *afz*)  
 59. *Chlorophyll agz* (Chl *agz*)  
 60. *Chlorophyll ahz* (Chl *ahz*)  
 61. *Chlorophyll aiz* (Chl *aiz*)  
 62. *Chlorophyll ajz* (Chl *ajz*)  
 63. *Chlorophyll akz* (Chl *akz*)  
 64. *Chlorophyll alz* (Chl *alz*)  
 65. *Chlorophyll amz* (Chl *amz*)  
 66. *Chlorophyll anz* (Chl *anz*)  
 67. *Chlorophyll aoz* (Chl *aoz*)  
 68. *Chlorophyll apz* (Chl *apz*)  
 69. *Chlorophyll aqz* (Chl *aqz*)  
 70. *Chlorophyll arz* (Chl *arz*)  
 71. *Chlorophyll asz* (Chl *asz*)  
 72. *Chlorophyll atz* (Chl *atz*)  
 73. *Chlorophyll auz* (Chl *auz*)  
 74. *Chlorophyll avz* (Chl *avz*)  
 75. *Chlorophyll awz* (Chl *awz*)  
 76. *Chlorophyll axz* (Chl *axz*)  
 77. *Chlorophyll ayz* (Chl *ayz*)  
 78. *Chlorophyll azz* (Chl *azz*)  
 79. *Chlorophyll azaa* (Chl *aza*)  
 80. *Chlorophyll abz* (Chl *abz*)  
 81. *Chlorophyll acz* (Chl *acz*)  
 82. *Chlorophyll adz* (Chl *adz*)  
 83. *Chlorophyll aez* (Chl *aez*)  
 84. *Chlorophyll afz* (Chl *afz*)  
 85. *Chlorophyll agz* (Chl *agz*)  
 86. *Chlorophyll ahz* (Chl *ahz*)  
 87. *Chlorophyll aiz* (Chl *aiz*)  
 88. *Chlorophyll ajz* (Chl *ajz*)  
 89. *Chlorophyll akz* (Chl *akz*)  
 90. *Chlorophyll alz* (Chl *alz*)  
 91. *Chlorophyll amz* (Chl *amz*)  
 92. *Chlorophyll anz* (Chl *anz*)  
 93. *Chlorophyll aoz* (Chl *aoz*)  
 94. *Chlorophyll apz* (Chl *apz*)  
 95. *Chlorophyll aqz* (Chl *aqz*)  
 96. *Chlorophyll arz* (Chl *arz*)  
 97. *Chlorophyll asz* (Chl *asz*)  
 98. *Chlorophyll atz* (Chl *atz*)  
 99. *Chlorophyll auz* (Chl *auz*)  
 100. *Chlorophyll avz* (Chl *avz*)  
 101. *Chlorophyll awz* (Chl *awz*)  
 102. *Chlorophyll axz* (Chl *axz*)  
 103. *Chlorophyll ayz* (Chl *ayz*)  
 104. *Chlorophyll azz* (Chl *azz*)  
 105. *Chlorophyll azaa* (Chl *aza*)  
 106. *Chlorophyll abz* (Chl *abz*)  
 107. *Chlorophyll acz* (Chl *acz*)  
 108. *Chlorophyll adz* (Chl *adz*)  
 109. *Chlorophyll aez* (Chl *aez*)  
 110. *Chlorophyll afz* (Chl *afz*)  
 111. *Chlorophyll agz* (Chl *agz*)  
 112. *Chlorophyll ahz* (Chl *ahz*)  
 113. *Chlorophyll aiz* (Chl *aiz*)  
 114. *Chlorophyll ajz* (Chl *ajz*)  
 115. *Chlorophyll akz* (Chl *akz*)  
 116. *Chlorophyll alz* (Chl *alz*)  
 117. *Chlorophyll amz* (Chl *amz*)  
 118. *Chlorophyll anz* (Chl *anz*)  
 119. *Chlorophyll aoz* (Chl *aoz*)  
 120. *Chlorophyll apz* (Chl *apz*)  
 121. *Chlorophyll aqz* (Chl *aqz*)  
 122. *Chlorophyll arz* (Chl *arz*)  
 123. *Chlorophyll asz* (Chl *asz*)  
 124. *Chlorophyll atz* (Chl *atz*)  
 125. *Chlorophyll auz* (Chl *auz*)  
 126. *Chlorophyll avz* (Chl *avz*)  
 127. *Chlorophyll awz* (Chl *awz*)  
 128. *Chlorophyll axz* (Chl *axz*)  
 129. *Chlorophyll ayz* (Chl *ayz*)  
 130. *Chlorophyll azz* (Chl *azz*)  
 131. *Chlorophyll azaa* (Chl *aza*)  
 132. *Chlorophyll abz* (Chl *abz*)  
 133.

17. The above information is true and correct to the best of my knowledge and belief.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

... it overlies ...  
... it proximal to ...

interfering with a carrier, are classed as acts of the public enemy, and relieve the carrier. Cooley 765, notes.

4. The common law liability does not apply in all respects to railroads as carriers of live stock,- since many of the perils thereof are due to the nature and propensities of the animals themselves; the owner is expected to accompany and care for them,- the railroad company simply furnishing proper cars and motive power, and carefully managing the trains. Cooley 765.

There are cases to the contrary, however.

5. Liability as carrier begins as soon as the goods are delivered with orders of shipment, but not while awaiting orders for shipment.
6. Liability as carrier ceases when they are delivered to the consignee (or if delivery is to be made at the carrier's warehouse, then after he has been notified and had a reasonable time to remove them), if the contract is one of through carriage over its own lines. Cooley 766-7. If goods are received to be transported beyond the line of the carrier, over other lines, there are two views or rules:
  - (a) The English rule which makes the original carrier liable as such until the goods are delivered at their destination. Some of the states follow this rule.
  - (b) But the American rule is usually said to be that the original carrier's liability as such ceases when the goods are delivered properly to the connecting carrier, for further transportation. 2 Am. & E. Enc. 859-860. Hale on Bailments 463.

#### B. Of Persons: Rule-

1. Basis of liability. "For the safe transportation of property, the common carrier is responsible as insurer, with the exceptions already stated; but in the case of passengers he only undertakes that he will carry them without negligence or fault. Cooley 768.
2. The care required, however, is "the most perfect care of provident and cautious men, and his undertaking and liability as to his passengers

1. The first step is to identify the problem. This involves understanding the current situation and what needs to be changed.

2. Next, we need to set clear goals. These should be specific, measurable, achievable, relevant, and time-bound.

3. Then, we develop a plan. This includes identifying the resources needed, the steps to be taken, and the timeline for completion.

4. After the plan is in place, we implement it. This involves putting the plan into action and monitoring progress.

5. Finally, we evaluate the results. This involves comparing the actual outcomes with the goals and making adjustments as needed.

SECRET

goes to this extent, that so far as human foresight and care can reasonably go, he will transport them safely". Cooley 768. The duty to carry a passenger's baggage safely is more strict than the duty to carry the passenger himself safely, - for the former ~~he~~ is liable without negligence, and for the latter only in case of negligence. Cooley 769.

3. Liability begins when the person presents himself for transportation by approaching the place of reception, for the purpose, as at the depot. Cooley 770.
4. The duty here is a duty to carry all in a fit condition, without discrimination, who present a proper ticket or tender the proper price. Cooley 771.
5. The duty also extends to use the utmost care to protect the passenger from ill treatment by employees, or from violence from any source whatever, that could be reasonably anticipated. Cooley 773.
6. Rules, - Carriers of persons are authorized to make reasonable rules and regulations for the protection of passengers and the carrying on of their business, such as providing tickets, conducting himself decently, &c. For a failure to do these they may be removed. The cases are not agreed as to whether a passenger can be rightly removed by the conductor if he is given the wrong ticket by the company's agent, when he is not at fault. Cooley 774; 25 Am. & E. Enc. 1076.

#### 4. Telegraph Companies:

- (1) They are charged with a duty to accommodate the public impartially, and transmit messages in the order in which they are received.
- (2) They are responsible in sending, receiving and delivering messages, on the ground of negligence only, and not as insurers.
- (3) They can make reasonable regulations for their business, which will be binding upon those to whom they are made known in dealing with them.

1. The first of these is the fact that the place of reception, at the time of the reception, was a very small one.

2. The second of these is the fact that the place of reception, at the time of the reception, was a very small one.

3. The third of these is the fact that the place of reception, at the time of the reception, was a very small one.

4. The fourth of these is the fact that the place of reception, at the time of the reception, was a very small one.

5. The fifth of these is the fact that the place of reception, at the time of the reception, was a very small one.

(4) Whether they can stipulate against liability for their ordinary negligence or not is in controversy. Cooley 775-7.

5. Professional service, - the general rules here applying to all alike, - physicians, surgeons, attorneys and solicitors, are that they contract

1. That they have that reasonable degree of learning, skill and experience, which is ordinarily possessed by those engaged in the same profession.

2. That they will use care and diligence in the exercise of the skill and knowledge possessed.

3. That they will use their best judgment.  
Cooley 777-9.

6. Skilled workmen, contract that they have, and will use in good faith, the ordinary degree of skill commonly possessed by those engaged in such occupations. Cooley 777.

These rules do not apply where services are merely volunteered as between friends and acquaintances; but where one holds himself out as having particular skill, and offers his services to those who accept them on this supposition, he will be liable though they be rendered gratuitously. Cooley 780.

### Statutory duties:

1. Purpose of such statutes. The question here is usually a question of interpreting the statute for the purpose of ascertaining whether the duty imposed is purely public, or both public or private. Such statutes usually have one or more purposes in view, such as (a) giving the public a new protection where the common law gave none; (b) to give to individuals peculiarly liable to injury, a remedy where none existed before, or (c) a more complete remedy than before existed. These particular purposes are not usually clearly set forth in the words of the statutes themselves, - but are left to be determined by interpretation. Cooley 780.

2. Rules of interpretation:

(a) Where a remedy existed by the common law, and a new remedy is given by the statute, and there are no words indicating that the new remedy is to be exclusive, the presumption is that it cumulative or additional to the common law remedy. Cooley 781.

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED

DATE 11/17/01 BY SP-6 BTJ/STP

80

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962

1961-1962



- (b) Where that which would otherwise be an actionable wrong is permitted upon public grounds, on condition that compensation be made, and the statute provides an adequate remedy, the inference is that the latter is the exclusive remedy. Cooley 782.
- (c) Where the statute imposes a new duty, where none existed before, and gives a specific remedy for the violation of such duty, there is a presumption that the remedy given is exclusive. This is implied when a duty is enjoined under penalty, the recovery of the penalty is in general the sole remedy, even though not made payable to the party injured. Cooley 783.

Exceptions:

1. If, however a plain duty is imposed for the benefit of individuals, and the penalty is obviously inadequate to compel performance, the implication is strong if not conclusive, that the penalty was meant to be cumulative to such remedy as the common law gave for a neglect of any duty. Cooley 784.
  2. If the duty imposed is obviously to the public and to individuals, and the penalty is made payable to the state or to an informer, the right of the individual to maintain an action for the breach of duty to himself will be unquestionable. Cooley 784.
3. Illustrations: Statutes relating to fencing railroads are designed for the protection of the travelling public, and for the owners of straying animals,- injuries resulting to either through the negligence of the company in failing to fence, give a private right of action. There is a conflict however as to whether there is any liability to any owner of straying cattle that first stray upon the land of another, and from there on to the track and are injured. Perhaps under most of the statutes liability is denied in such case,- the duty to fence being a duty only to adjoining owner. Cooley 786.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

59

60

61

62

63

64

65

66

67

68

69

70

71

72

73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

93

94

95

96

97

98

99

100

Statutes requiring the ringing of bells, or sounding whistles, or putting up danger signs, or providing gates or watchmen at railroad crossings, are moant for the protection of individuals, and failure in these particulars, resulting in damage, gives a private right of action. Cooley 789.

Statutes requiring dangerous machinery to be fenced, bridges to be kept in repair, forbidding selling dangerous explosives without labeling them, forbidding the moving of trains in cities at dangerous speed, &c., create duties to private persons. In short it is a

4. General Rule, "that when the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none." Cooley 790.

with the same  
100

100

100

100

100

, 10000

10000

10000

10000

10000

10000

10000

10000

10000

10000

10000

CHAPTER XXI.

---oOo---

GENERAL PRINCIPLES GOVERNING REDRESS FOR NEGLIGENCE.

1. Definition, - Negligence is the absence of such care, prudence and forethought; as under the circumstances duty required should be given or exercised. Cooley 791. See also Ch.XX, above.

2. Elements of action for. There must be shown

1. The existence of a duty owed to the plaintiff.
2. A failure to perform this duty.
3. Damage resulting proximately.

As to the first of these, duties are

- (a) General, owing to everybody, - in which case there can be no foundation for an action until some individual is placed in a position to insist upon its performance for his special benefit. For example, there is a general duty of railroad companies to run their cars carefully. - but this becomes a particular duty to a particular individual only when he is a passenger, or wishes to cross the track, or his property in a position or situation to be injured if the duty is not performed. Cooley 792-3.
- (b) Particular, - owing only to a single person by reason of his peculiar position, as the duty of a land owner to furnish by his land lateral support for the adjoining land; Cooley 792-3.

As to the second,

- (a) Failure to use care is an affirmative fact and must be alleged and shown, by the one alleging it.
- (b) The amount of evidence necessary to do this varies greatly with the circumstances:
  - (1) In some cases the injury itself affords sufficient prima facie evidence of negligence. For example, the return of bailed goods in a damaged condition, calls for an explanation; the destruction of property by fire originating with locomotives, - the fire itself is evidence of negligence until explained; so, too, when a passenger is injured in a wreck, the wreck itself, until explained, is evidence of negligence, - and generally:



"When damage occurs from an act which when properly done does not cause damage, a presumption of negligence arises." Cooley 794-800

- (2) In other cases there is no presumption from the injury itself as to who is negligent; for example, if a collision occurs between two carriages on the highway, - from this fact alone, it may be presumed that one or both drivers were negligent, but there is no presumption as to which one was negligent, unless some further fact is shown, such as being on the wrong side of the road or something of that kind. Cooley 797-799.

- (3) Negligence is a mixed question of law and fact, - Was there a duty is a question of law, - was it performed is a question of fact. Hence the question is for the jury in most cases, under a proper direction of the court. The jury must first find the facts, and then determine whether the defendant exercised the care the circumstances demanded; and in doing this they must consider whether the defendant acted as an ordinarily prudent man would have done under the circumstances found, - and the standard of prudence does not vary with individual ability in the case of competent adults, - the standard of the average prudent man is demanded from all. But the same degree of care is not demanded of children of tender age, as of adults, nor under some circumstances of the deaf, dumb, or blind, or of insane persons, if the insanity is due to extraordinary exertion in trying to prevent injury. Jaggard 871. To the rule that the question is for the jury, there are some

Exceptions:

- (1) When the question arises wholly on the pleadings, as by demurrer to the petition, the court must decide whether there is any show of negligence.
- (2) When the facts are all admitted, and the inference to be drawn from them is clear, the court also decides.
- (3) But if the facts are doubtful, or fair minded men would differ as to the proper inference to be drawn from them, the court should





- submit the matter to the jury. Cooley 800-806
- (d) Burden of proof, - as indicated above the burden of is on the plaintiff to show negligence in cases where there is no contract; but Pollock says that when there is a contract or undertaking, the burden of proof is thrown on the other party, by the mere fact of an injury happening, to explain it. Pollock 548.

Contributory negligence.

1. The general rule here is "that no man shall base a right to recovery upon his own fault, - as between two wrongdoers the law leaves the consequences to rest where they happen to fall." Cooley 807.  
In the application of this rule, three questions arise: The burden of proof; the degree of contributory negligence; rule as to imputed negligence. Of these in their order -
2. Burden of proof: There are two views as to this:
  - (a) Since neither negligence nor contributory negligence is presumed without some evidence, contributory negligence is always a matter of defense, and must be alleged and proved by the defendant. To this rule there is an exception, - if from the plaintiff's allegations, or from the evidence he puts in to show the defendant's negligence, it appears that the plaintiff was himself at fault, he must remove this appearance by other evidence, before the defendant can be called upon to answer. Cooley 809.
  - (b) The other view is "that negligence in one party presupposes the duty of care upon him for the protection of the other, the plaintiff does not show this duty until he shows his own relative position", - or in other words, there is no duty to use care to protect one who is not careful at the time, - the absence of contributory negligence becomes a part of the plaintiff's case, and he must allege and prove it before the defendant is called to answer. Cooley 809-10.
3. Degree of contributory negligence.

1. Wanton conduct. "Where the conduct of the defendant is ~~wanton~~, willful, or reckless,

The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present. The author then proceeds to a detailed examination of the early years of the nation, from the time of the first settlers to the end of the Revolutionary War. This section covers the various challenges faced by the young country, including the struggle for independence and the establishment of a new government.

The second part of the paper focuses on the period of the early republic, from the end of the Revolutionary War to the beginning of the 19th century. This section explores the development of the federal government and the role of the judiciary. It also discusses the various political movements and the impact of the Industrial Revolution on the country. The author argues that this period was crucial in shaping the character of the United States and its institutions.

The third part of the paper deals with the mid-19th century, a time of great social and political change. This section covers the rise of the abolitionist movement, the expansion of slavery, and the growing tensions between the North and the South. It also discusses the role of the federal government in addressing these issues and the impact of the Civil War on the nation. The author concludes that this period was a defining moment in the history of the United States, one that shaped its future in profound ways.

the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury irrespective of the fault which put the plaintiff in the way of such injury." Cooley 811.

2. Any degree of negligence, however slight, upon plaintiff's part, which proximately contributes to his injury, will prevent recovery; the courts will make no attempt to estimate the part due to the defendant's act and the part due to the plaintiff's act, and apportion them, - but will excuse the defendant entirely. The rule is different in admiralty, and was formerly different in some of the states, as Illinois, - but this state has abandoned the rule of comparative negligence; 153 Ill 163.

As to when the plaintiff's negligence is proximate to his damage, the following sub-rules are important:

- (a) If plaintiff's negligent act precedes that of defendant, and the latter either knew, or by the exercise of reasonable care could have known of the conditions, and by the exercise of due care could prevent injury, it is his duty to do so, and if he fails, his negligence is the proximate cause, and that of the plaintiff's is remote. Cooley 811. Pollock 579; Davies v. Mann 12 Mees & W. 546.
  - (b) On the other hand, if the defendant's negligence precedes the plaintiff's, and the latter could by the exercise of ordinary care have avoided the injury he can not recover. Cooley 812; Pollock 579; Butterfield v. Forrester 11 East 60
- Or both these rules may be stated thus:

"he who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other, is solely responsible." Pollock 579.

- (c) If the negligent acts are simultaneous, then the plaintiff's negligence is

[illegible]

proximate and he can not recover.

3. Encountering peril to save life, "So highly does the law regard human life, that it will not impute negligence to an effort to preserve it, if from the appearances the party had reason to believe he might succeed in the attempt, though not without danger to himself." Cooley 817

#### 4. Imputed negligence:

- (a) In the case of children:

It has been held in England (El.Bl.& El. 719) and also in New York in *Hartfield v. Roper*, 21 Wend.(N.Y.) 615, that "an infant of tender years is chargeable with the negligence of the person having him in charge," and he can not recover damages for an injury to him due to the negligence of third parties, or as has been said, these courts have performed the "dialectical feat of indentifying a child with its grandmother". Such a barbarous doctrine is now generally abandoned in the United States, though adhered to yet in some states. See Notes 49 Sm.St.R.413, and 44 Am. St.Rep. 145; 14 St.R. 591.

Of course where the parent sues for loss of service caused by an injury to the child, the contributory negligence of the parent will defeat a recovery. Jaggard 988.

- (b) Negligence of third parties, - A similar doctrine was held in *Thoroughgood v. Bryan*, 8 C.B.115, by which the person in a public or private conveyance was so identified with the person in charge of it as to be considered a party to the negligence of such person in such way as to prevent a recovery. Such a rule is now abandoned in England and in the United States, unless there is some control or management exercised by the passenger over the driver. Cooley 842-5; *The Bernina L.R.* 12 Prob.Div.58; *Little v. Hackett* 116 U.S. 366.

#### 5. Contracts against liability for negligence.

- (a) It is a general rule that contracts stipulating for non-liability for negligence are

[illegible]

149561 1 020 022

[illegible]

against public policy and void. Cooley 825.

- (b) But in the case of common carriers, it is generally held that by express contract, they can limit their extraordinary liability to the liability of ordinary bailees for hire, - but can not stipulate against the ordinary negligence of themselves or servants. Some states allow further limitations to be made. Cooley 825.

- (c) Telegraph companies, - stipulations that the company will not be liable for mistakes in unrepeatd messages, though due to the negligence of the company, have been upheld, though it is believed, by the weight of authority, so far as being an attempt to relieve against negligence, such stipulations are void. Cooley 829. 25 Am.& E. Enc. 790; W.U.Tel.Co. v. Crawford 4 Am.& E.Corp. Cas. (N.S.) 230, note p.232.

[illegible]



## CHAPTER XXII.

---oOc---

## PLACE OF EVIL MOTIVE IN THE LAW OF TORTS.

1. There is no consistent theory as to liability for tort. Three theories have been advanced:

- (a) The historical, based in the early common law upon an absolute liability,- a person acts at his peril,- he is responsible for damages occurring regardless of motive or care. This, though yet preserved, in some cases where there is peculiar danger, is not generally applied now.
- (b) The philosophical, based upon culpability, where there is some sort of moral delinquency, or short coming. This view seems to be gaining ground, especially when the liability of incompetent persons is being considered.
- (c) The practical, based on the actual state of the law,- there must be both wrong (something amiss within the meaning of the law, due to some fault) and resulting damage to a definite person. This fault or thing amiss may indicate an active guilty state of mind,- or a negative state of mind by failing to use it, or an innocent mental state, which is willing to assume the peril of acting. Holmes Con. Law 79; Jaggard Torts 48; Pollock Torts Ch.1; Bigelow's Introduction; Cooley Ch.1 & IV.

2. It is generally held, however, that "bad motive is no tort; an act which does not amount to a legal injury can not be actionable though done with a bad intent,"

whatever is lawful between friends can not be unlawful between enemies; "what one has a right to do another can have no right to complain of.

Cooley 831.

Illustrations,-- for governmental action, or failure to act to the injury of another, whatever may have been the motive, there is no right of action, but only a right to appeal to the justice or mercy of the government. Cooley 831 This rule is applied to the legislative, executive, and the judicial departments when



in the exercise of their lawful authority: as said in regard to the legislature,- "legislation shall not be assailed in the courts on an allegation of malice, bad faith or corruption in passing it." Cooley 831.

3. Upon the other hand, bad motive is held generally to make bad acts worse, so as to allow the infliction of exemplary damages. Cooley 832,836.

4. So, too, "the most correct motive, or even inability to indulge a motive, will not protect one who invades the right of another. The legal wrong is found in the injury done and not in the motive." Cooley 834.

There are to these rules some

Exceptions, or apparent exceptions.

(a) Libel and slander,- it is said that malice is an essential element here; but this is only apparently so, for if the charge is shown to be false, and no privilege is shown, the law presumes malice.

But there are two real exceptions:

(b) Conditional privilege in the law of slander and libel,- is a privilege only when charges are made in good faith; if made maliciously, there is no privilege; in other words false statements made in good faith to certain persons having an interest in them, are not actionable; whereas if the same statements, made under otherwise the same circumstances to the same parties, but with malice, are actionable. Cooley 835.

(c) The same is true in malicious prosecution,- the same acts done in good faith are not actionable, but become so if done maliciously. Cooley 835.

It might be suggested in answer to the view taken in rule

2 above,- that the question is largely one of what is a

legal right. When it is said "What one has a right to do, another has no right to complain of",- that is a mere truism; it is, however- not necessarily the same to say that one has a legal right to do maliciously what he otherwise would have a legal right to do. If this is affirmed, it is fair to ask "Has any one a right to harm another without a reason that is justifiable?" And is any reason justifiable except one that is morally so,

- C.

one that is based on a reasonable or morally legitimate purpose or end? Has A the right to harm B, just because he wishes to do so, without forwarding or protecting a legitimate purpose of his own? If a negligent (but otherwise good faith act) plus harm equals a tort, why should not an actually morally bad act plus harm equal tort? And why should not a morally bad act plus harm done always be a tort?

---oOo---



## NOTES ON THE DOCTRINE OF PROXIMATE CAUSE.

By Prof. Wilgus.

There must be a conjunction of wrong and damage to produce a tort; and these must, generally, be so related that the wrongful act can be said to be the proximate cause of the damages; or the damages allowed must be the proximate consequences of the wrongful act.

These are exceedingly difficult accurately to define. The following attempts have been made:

Proximate Cause is "one which directly produced, or concurred directly in producing the injury;" "one without which the accident would not have occurred;" "one of which the injury is a natural and probable consequence;" "direct and natural;" "ordinary and natural;" "closeness of causal relation, not nearness in time nor distance, is the test."

Remote Cause is "that which may have happened without producing an injury, notwithstanding that no injury could have occurred if it had not happened."

Proximate Consequences are "direct and natural;" "such as might probably ensue in the natural and ordinary course of events;" "ordinary and natural;" "or such as according to common experience and the natural course of events might reasonably be anticipated;" "such as might and ought to have been foreseen." (See especially note 36 Am. St. R. 807).

A somewhat more ambitious definition is: Those consequences, and those only are deemed "immediate" "proximate," or "natural and probable," which

1. A person of average competence and knowledge,
2. being in the like case or circumstance with the person whose conduct is complained of,
3. having like opportunities of observation.
4. (a) foresees,  
(b) might be expected to foresee,  
(c) ought to foresee,  
(d) or could possibly foresee,

As likely, (or possible), to follow such conduct,

5. Through a natural (though perhaps an extraordinary) course of events.

It may be that what is included in parenthesis and under (d) above should be left out; many cases certainly so hold, though some well considered cases have gone far enough to justify the stronger statements. See generally, Pollock Torts (Webb's Ed.) p. 32; Jaggard, Torts, §§ 22-26.

9

TO THE HONORABLE SECRETARY OF THE ARMY, WASHINGTON, D. C.

SIR:

I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,  
Your obedient servant,  
J. H. ...

...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...

1. The first of these is the "Soviet Union" which is the only country in the world which has a government which is not a democracy. It is a one-party state, and the only party is the Communist Party. The government is controlled by a small group of men, and the people have no say in the running of the country. The Soviet Union is a threat to the peace of the world, and it is the duty of all free people to oppose it.



## R U L E S :

(1) Intended or actually foreseen consequences:

If it be proved that the particular consequences were intended and foreseen by the wrongful actor, he is liable whether they were proximate in fact or not, for the law holds that "that which a man actually foresees is to him, at all events, natural and probable." Pollock, Torts, (Webb's Ed). p. 32-33.

(2). Wilful acts, i. e. such as are intended to do harm:

Though the consequences here are more than were intended or different either as to events or the person affected, the wrong doer is liable for the natural consequences of his acts. "A wrong doer who goes about to do harm cannot stop the risk at his pleasure nor confine his liabilities to what he actually intended, but is liable for the natural consequences of his act." Pollock (Webb's Ed.), 35.

(3) Acts distinctly wrongful:

From a distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary, and proximate result,--Cooley's 1st rule, Torts p. 74.

(4). Acts not distinctly wrongful: When an act or omission not in itself a distinct wrong, but becomes such only through injurious consequences resulting therefrom, these must be alleged and proved to have resulted from the act or omission according to the ordinary course of events as a proximate result of a sufficient cause.--Cooley's 2nd rule,--Torts p. 75.

(5). Combination of Causes: Cooley's 3rd and 4th rules, Torts p. 76, 89; may be, with some modifications, put in the following tabular form:

1. The first of these is the fact that the  
2. second of these is the fact that the  
3. third of these is the fact that the  
4. fourth of these is the fact that the  
5. fifth of these is the fact that the  
6. sixth of these is the fact that the  
7. seventh of these is the fact that the  
8. eighth of these is the fact that the  
9. ninth of these is the fact that the  
10. tenth of these is the fact that the

1. The first of these is the fact that the  
2. second of these is the fact that the  
3. third of these is the fact that the  
4. fourth of these is the fact that the  
5. fifth of these is the fact that the  
6. sixth of these is the fact that the  
7. seventh of these is the fact that the  
8. eighth of these is the fact that the  
9. ninth of these is the fact that the  
10. tenth of these is the fact that the

:Original wrongful act	-----	A
:		
:		
:Dependent	: Innocent	-----B
:upon original	:	
:wrongful act.	: Wrongful	-----C
:		
:		
:		
:Interven	: Foreseeable	
ing; and	: by A.	-----D
:		
:	: Innocent	
:	:	
:	: Unforeseeable	
:	:	
:	: by A.	-----E
:Independent of:		
:the original	: Superseding the	
:wrongful act	: original wrong-	-----F
:	: ful act	
:		
:	: Wrongful	
:		
:	: Responsible, but	:Foresee-
:	: not superseding,	:able by A--G
:		:Unfors-
:		:seeable
:		:by A.-----H
:		
:Concurrent with the original wrongful act	-----	I

Then A + B = leaves A liable, B not liable  
 A + C = " A " , C liable too  
 A + D = " A " , D not liable  
 A + E = Conflict :A liable, : E not liable =  
 :A not liable :  
 A + F = A not liable, F liable  
 A + G = A liable, G liable also  
 A + H = A not liable, H liable  
 A + I = A and I, either or both liable.

By original wrongful act, is meant "one which would or might naturally, according to the ordinary course of events, prove injurious in some way to some person."

"Dependent upon the original wrongful act,"--one that is started by, produced by, caused by, set in motion by the original wrongful act, or the latter is necessary to the existence of the former.

22

1999007

1. 100 100

June 25, 1964

000575

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

• *Journal of the American Medical Association*, 1997; 277: 1025-1030.

Figure 1. Schematic diagram of the experimental setup. The subject is seated in a chair, viewing a video screen. The video screen displays a target (a red dot) and a starting point (a green dot). The subject's hand is positioned at the starting point. The video screen is connected to a computer system.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

Figure 1

— 36 —

$\frac{d}{dt} \left( \frac{\partial L}{\partial \dot{x}} \right) = \frac{\partial L}{\partial x}$

... 2012

2145000

— 100 —

— Joe Clark, *winning* 287-288

[illegible]
$$g(\tau) = \frac{1}{2} \left( 1 + \frac{\tau}{\tau_0} \right) \quad \text{for } \tau \leq \tau_0$$
$$f(x) = \frac{1}{x^2} = x^{-2} \Rightarrow f'(x) = -2x^{-3} = -\frac{2}{x^3}$$

*Journal of Management Studies*, 19(6), 701-718.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

only six of the 100

Small Business Development Corporation

And, to be sure, the *Journal* is not alone in this. The *Journal of the American Medical Association* has also been criticized for its editorial board's failure to include a woman.

1. *Phragmites* 2. *Phragmites* 3. *Phragmites* 4. *Phragmites* 5. *Phragmites* 6. *Phragmites* 7. *Phragmites* 8. *Phragmites* 9. *Phragmites* 10. *Phragmites* 11. *Phragmites* 12. *Phragmites* 13. *Phragmites* 14. *Phragmites* 15. *Phragmites* 16. *Phragmites* 17. *Phragmites* 18. *Phragmites* 19. *Phragmites* 20. *Phragmites* 21. *Phragmites* 22. *Phragmites* 23. *Phragmites* 24. *Phragmites* 25. *Phragmites* 26. *Phragmites* 27. *Phragmites* 28. *Phragmites* 29. *Phragmites* 30. *Phragmites* 31. *Phragmites* 32. *Phragmites* 33. *Phragmites* 34. *Phragmites* 35. *Phragmites* 36. *Phragmites* 37. *Phragmites* 38. *Phragmites* 39. *Phragmites* 40. *Phragmites* 41. *Phragmites* 42. *Phragmites* 43. *Phragmites* 44. *Phragmites* 45. *Phragmites* 46. *Phragmites* 47. *Phragmites* 48. *Phragmites* 49. *Phragmites* 50. *Phragmites* 51. *Phragmites* 52. *Phragmites* 53. *Phragmites* 54. *Phragmites* 55. *Phragmites* 56. *Phragmites* 57. *Phragmites* 58. *Phragmites* 59. *Phragmites* 60. *Phragmites* 61. *Phragmites* 62. *Phragmites* 63. *Phragmites* 64. *Phragmites* 65. *Phragmites* 66. *Phragmites* 67. *Phragmites* 68. *Phragmites* 69. *Phragmites* 70. *Phragmites* 71. *Phragmites* 72. *Phragmites* 73. *Phragmites* 74. *Phragmites* 75. *Phragmites* 76. *Phragmites* 77. *Phragmites* 78. *Phragmites* 79. *Phragmites* 80. *Phragmites* 81. *Phragmites* 82. *Phragmites* 83. *Phragmites* 84. *Phragmites* 85. *Phragmites* 86. *Phragmites* 87. *Phragmites* 88. *Phragmites* 89. *Phragmites* 90. *Phragmites* 91. *Phragmites* 92. *Phragmites* 93. *Phragmites* 94. *Phragmites* 95. *Phragmites* 96. *Phragmites* 97. *Phragmites* 98. *Phragmites* 99. *Phragmites* 100. *Phragmites*

2014年12月15日 星期二

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

... if you can

1. The first part of the paper is devoted to the study of the
  $\mathcal{H}^1$ 
 norm of the function  $f$  in the case where  $f$  is a
 function of bounded variation.

Mr. L. J. R. ...

1. The first group of authors (e.g., [1, 2]) has shown that the use of the term "cognitive" is not sufficient to distinguish between the various types of cognitive systems. The term "cognitive" is used to describe a wide range of systems, from simple systems that perform basic tasks to complex systems that perform tasks that require human-like reasoning. This is a problem because it makes it difficult to compare and contrast different types of cognitive systems.

1980-1981, 1981-1982, 1982-1983, 1983-1984, 1984-1985, 1985-1986, 1986-1987, 1987-1988, 1988-1989, 1989-1990, 1990-1991, 1991-1992, 1992-1993, 1993-1994, 1994-1995, 1995-1996, 1996-1997, 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022, 2022-2023, 2023-2024, 2024-2025, 2025-2026, 2026-2027, 2027-2028, 2028-2029, 2029-2030, 2030-2031, 2031-2032, 2032-2033, 2033-2034, 2034-2035, 2035-2036, 2036-2037, 2037-2038, 2038-2039, 2039-2040, 2040-2041, 2041-2042, 2042-2043, 2043-2044, 2044-2045, 2045-2046, 2046-2047, 2047-2048, 2048-2049, 2049-2050, 2050-2051, 2051-2052, 2052-2053, 2053-2054, 2054-2055, 2055-2056, 2056-2057, 2057-2058, 2058-2059, 2059-2060, 2060-2061, 2061-2062, 2062-2063, 2063-2064, 2064-2065, 2065-2066, 2066-2067, 2067-2068, 2068-2069, 2069-2070, 2070-2071, 2071-2072, 2072-2073, 2073-2074, 2074-2075, 2075-2076, 2076-2077, 2077-2078, 2078-2079, 2079-2080, 2080-2081, 2081-2082, 2082-2083, 2083-2084, 2084-2085, 2085-2086, 2086-2087, 2087-2088, 2088-2089, 2089-2090, 2090-2091, 2091-2092, 2092-2093, 2093-2094, 2094-2095, 2095-2096, 2096-2097, 2097-2098, 2098-2099, 2099-2100, 2100-2101, 2101-2102, 2102-2103, 2103-2104, 2104-2105, 2105-2106, 2106-2107, 2107-2108, 2108-2109, 2109-2110, 2110-2111, 2111-2112, 2112-2113, 2113-2114, 2114-2115, 2115-2116, 2116-2117, 2117-2118, 2118-2119, 2119-2120, 2120-2121, 2121-2122, 2122-2123, 2123-2124, 2124-2125, 2125-2126, 2126-2127, 2127-2128, 2128-2129, 2129-2130, 2130-2131, 2131-2132, 2132-2133, 2133-2134, 2134-2135, 2135-2136, 2136-2137, 2137-2138, 2138-2139, 2139-2140, 2140-2141, 2141-2142, 2142-2143, 2143-2144, 2144-2145, 2145-2146, 2146-2147, 2147-2148, 2148-2149, 2149-2150, 2150-2151, 2151-2152, 2152-2153, 2153-2154, 2154-2155, 2155-2156, 2156-2157, 2157-2158, 2158-2159, 2159-2160, 2160-2161, 2161-2162, 2162-2163, 2163-2164, 2164-2165, 2165-2166, 2166-2167, 2167-2168, 2168-2169, 2169-2170, 2170-2171, 2171-2172, 2172-2173, 2173-2174, 2174-2175, 2175-2176, 2176-2177, 2177-2178, 2178-2179, 2179-2180, 2180-2181, 2181-2182, 2182-2183, 2183-2184, 2184-2185, 2185-2186, 2186-2187, 2187-2188, 2188-2189, 2189-2190, 2190-2191, 2191-2192, 2192-2193, 2193-2194, 2194-2195, 2195-2196, 2196-2197, 2197-2198, 2198-2199, 2199-2200, 2200-2201, 2201-2202, 2202-2203, 2203-2204, 2204-2205, 2205-2206, 2206-2207, 2207-2208, 2208-2209, 2209-2210, 2210-2211, 2211-2212, 2212-2213, 2213-2214, 2214-2215, 2215-2216, 2216-2217, 2217-2218, 2218-2219, 2219-2220, 2220-2221, 2221-2222, 2222-2223, 2223-2224, 2224-2225, 2225-2226, 2226-2227, 2227-2228, 2228-2229, 2229-2230, 2230-2231, 2231-2232, 2232-2233, 2233-2234, 2234-2235, 2235-2236, 2236-2237, 2237-2238, 2238-2239, 2239-2240, 2240-2241, 2241-2242, 2242-2243, 2243-2244, 2244-2245, 2245-2246, 2246-2247, 2247-2248, 2248-2249, 2249-2250, 2250-2251, 2251-2252, 2252-2253, 2253-2254, 2254-2255, 2255-2256, 2256-2257, 2257-2258, 2258-2259, 2259-2260, 2260-2261, 2261-2262, 2262-2263, 2263-2264, 2264-2265, 2265-2266, 2266-2267, 2267-2268, 2268-2269, 2269-2270, 2270-2271, 2271-2272, 2272-2273, 2273-2274, 2274-2275, 2275-2276, 2276-2277, 2277-2278, 2278-2279, 2279-2280, 2280-2281, 2281-2282, 2282-2283, 2283-2284, 2284-2285, 2285-2286, 2286-2287, 2287-2288, 2288-2289, 2289-2290, 2290-2291, 2291-2292, 2292-2293, 2293-2294, 2294-2295, 2295-2296, 2296-2297, 2297-2298, 2298-2299, 2299-2300, 2300-2301, 2301-2302, 2302-2303, 2303-2304, 2304-2305, 2305-2306, 2306-2307, 2307-2308, 2308-2309, 2309-2310, 2310-2311, 2311-2312, 2312-2313, 2313-2314, 2314-2315, 2315-2316, 2316-2317, 2317-2318, 2318-2319, 2319-2320, 2320-2321, 2321-2322, 2322-2323, 2323-2324, 2324-2325, 2325-2326, 2326-2327, 2327-2328, 2328-2329, 2329-2330, 2330-2331, 2331-2332, 2332-2333, 2333-2334, 2334-2335, 2335-2336, 2336-2337, 2337-2338, 2338-2339, 2339-2340, 2340-2341, 2341-2342, 2342-2343, 2343-2344, 2344-2345, 2345-2346, 2346-2347, 2347-2348, 2348-2349, 2349-2350, 2350-2351, 2351-2352, 23

Independent of the original wrongful act,--one not caused by it, or set in motion by it, though it may take advantage of it, or combine with it as an additional cause, or condition.

Superseding, one that is sufficient to cause the alleged injury and which, by breaking the connection with the original wrongful act, thereby supersedes or displaces the latter.

Responsible,--that is the culpable act of another human being, responsible for his own acts, and for whose acts a liability may attach.

Innocent, an act without fault; wrongful, one due to something amiss, by the malfeasance, misfeasance, or nonfeasance of a human being.

In this connection as to "foreseeable" or "unforeseeable" it may be said that every one is presumed to know:

(1) That matter is governed by fixed laws, and cannot be the subject of human activity without producing results, depending on the character of matter affected.

(2) That the bodies of men and animals are so constructed as to be the subject of injury by violence, or unhealthy conditions.

(3) That all men and animals are controlled to a certain extent by appetites, impulses, instincts, feelings and emotions, each of which if worked upon in certain ways will be likely to induce certain conduct. (In the case of animals this is carried to its logical conclusions, as much as in inorganic nature; in case of human beings not always so). See note 36 Am. St. R. 807.

(6). Concurrent wrongs: "If the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause; and the parties held responsible, either jointly or severally, for the injury." Cooley's 4th rule, Torts p. 89.

(7). Accidental injuries: For a purely accidental occurrence, causing damage without the fault of the person to whom it is attributable, no action will lie." Cooley's Torts p. 91.

(8). Damage From lawful acts: "It is damnum absque injuria, if through the lawful and proper exercise of a man's own rights damage results, even though they might have been anticipated and avoided. Cooley's Torts, p. 93.

(9). Duty to plaintiff: There must be a duty owing by the defendant to the plaintiff, before the latter can maintain an action against the former. 87 Fed. R. 109.



(10). Province of judge and jury. The judge determines whether the cause is or is not proximate to a harmful result:

1. When there is no reasonable doubt about the matter.
2. When the question is raised by the pleadings.
3. When there is an agreed statement of facts.
4. When the facts are undisputed, all subject to the following qualification, -- "in all cases where there is either uncertainty as to the facts or the proper inference to be drawn from them, the question should be left to the jury to determine."

#### PROBLEMS TO ILLUSTRATE THE DOCTRINE OF PROXIMATE CAUSE.

P equals plaintiff; D. equals defendant.

1. D's pilot cutter, through negligence of the captain struck upon a shoal three fourths of a mile from P's sea wall; at the time there was a strong wind and flood tide, so that the vessel became unmanagable, and drifted against P's wall and damaged it, for which P. sued D. Is he entitled to recover? Why?

*yes.*  
*L.R. 5 Exch. 204 - 1870.*

2. P. sued D. alleging that he so negligently managed his horse hitched to a sled and driven in the streets of E., as to drive against the sleigh of C. upon T. street, breaking C's sleigh, and scaring his horse so that it escaped from C's control, and finally ran into P's sleigh, in which P was then riding on E. street, broke the sleigh to pieces, threw P out and broke his collar bone. D. demurred to P's declaration. Should the demurrer be sustained or overruled? Why?

*McDonald v. Snelling 14 Allen (Mass.) 290*

3. D. was the owner of a warehouse, and wishing to remove a heavy bag of wool from an upper to a lower story, directed his servants to throw it out of the window opening into a yard. The servants when about to do so called out to warn those below. P. heard the call, and looking up saw the bag about to be thrown out, and started to run, as he supposed, out of the way, but was hit by the falling bag. The judge directed the jury that if they thought P. lost his presence of mind, by the act of D's servants, and in the confusion ran into danger and was hurt, a verdict could be given to him. Was this correct? Why?

*Worley v. Scoville*

*3 Man & Ry. 105 - 1829.*

4. D. in searching for his cattle left P's bars down, whereby P's sheep escaped, were totally lost, and as the evidence tended to show, by being killed by bears. D. asked





the Court to charge the jury that if they found that bears killed the sheep after their escape, P. could not recover. This was refused, but the court did charge that if they found D. left the bars down, and the sheep escaped in consequence, and would not have been killed but for this act of D. he was liable. The jury gave a verdict for P. Was there error? Why?

*Gilman v. Noice 57 N. Ham. 627*

*case re-versed. 1876.*

5. P. sued D. alleging that though D's negligence fire was communicated from D's steamboat on the river to D's elevator 120 feet high, on the river bank, and from there to P's saw mill 538 feet away, and then to P's lumber pile 382 feet further away, all because of an unusually strong wind blowing toward the mill from the elevator. The jury found a verdict for P. D. claimed there was error in this because the court, upon request, refused to charge that the proximate cause of P's loss was the burning of the elevator, and not the negligence of D. in setting it afire. Was there error? Why?

*Milwaukee & St. P. v. Kellogg 94 U. S. 469 - 1876*

*D. liable. no error.*

6. P. sued D. a railroad company for destruction of his wood, by a fire alleged to have been caused by the negligence of D. in allowing dead brush and weeds to accumulate on the right of way, catch fire from its engines, and spread on to the adjoining land, and continuing for nearly two days, extend over the lands of several intervening owners for a distance of over two miles, and finally damage P. Motion to dismiss the case on the ground of remoteness of the damages, was made and overruled. Was there error? Why?

*Error in N. Y.*

*Hoffman v. King 160 N. Y. 618 - 1899.*

7. D's railroad was close to the bank of a certain creek; one rainy day, after a train had passed, a land slide occurred, so that a train loaded with oil, following about ten minutes later, was thrown off the track, and the oil cases overturned, the oil spread out on the waters of the creek, then much swollen by the rain, took fire, and was carried several hundred feet to P's property which it partly destroyed and for which P. sued. The court was asked to direct the jury that if they believed from the evidence that the accident complained of was the result of D's negligence, and by reason thereof, the oil, ignited by the engines, ran immediately down the creek, where it was carried by the current a few minutes and set fire to P's property, P. should recover. This was refused, and the jury was instructed that upon the facts P. could not recover. Was this error? Why?

*no error*

*Brad v. L. & M. 85 Penna State. 293*

Suit by P. as executor of A., under statute giving right to sue for death by wrongful act. It was alleged in substance that through D's negligence A. was injured in a

10. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California:

11. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

12. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

13. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

14. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

15. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

16. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

17. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

18. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

19. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

20. The total area of land owned by the United States in the State of California is approximately 100,000,000 acres.

[illegible]

1. The first of these is the fact that the United States has a large and growing population of people who are not citizens of the United States. This is a result of the large number of immigrants who have come to the United States in recent years, and the fact that many of these immigrants are not naturalized citizens.

collision, whereby his spine was so affected that he became deranged and insane, and finally, after 8 months of illness and suffering during which period he had all sorts of illusions, and forebodings, took his own life. D. demurred to the declaration, and this was sustained. Was there error? Why?

9. D. wrongfully entered upon P's land and ousted him of possession. While D. was in possession he tore down and destroyed part of a building which P used as a stable. In this stable was a feed box in which P. had placed for safe keeping \$2,000 in money. This was lost when the stable was destroyed. P. sued for the destruction of the stable and the loss of the \$1,000. Should he recover? Why?

10. D. procured arsenic, put it in a roasted apple, and gave it to his sick wife, intending to poison her. The wife tasted it, but not knowing it contained poison, gave it to A. who was killed by it. Under Lord Campbell's act, P. as executor of A. sued D. Should he recover? Why?

11. P. sued D., a municipal corporation, alleging that it negligently allowed a pit to be dug and remain open along the side walk, wherein the plaintiff, without any fault on his part, fell and was injured. D. answered that P. was a constable who had arrested one H. and was taking him to jail, and when they came opposite the pit, H. threw P. into the pit, and escaped. To this answer P. demurred. Should the demurrer be sustained or overruled? Why?

12. D. sold L. & T., boys, 12 and 10 years old pistol cartridges, loaded with powder and ball, and showed them how to use them in a toy pistol they owned. Shortly afterward the loaded pistol was left lying on the floor at the home of the boys; it was picked up by the boys' little brother 6 years old, and fired, the ball hitting T. from which he died. P. T's father, under Lord Campbell's Act sued D. Should he recover? Why?

13. D. carelessly left a truck loaded with iron in a public street for 20 minutes or more in the evening; the iron was negligently placed as to easily fall off. P. and another boy, each about 7 years old, were walking along the street on the opposite side when L. a boy 13 years old called to them to come over and see him move the truck; this they did, and while standing near the truck, L. took hold of the tongue, moved it, and the iron fell off, and injured P. The jury gave a verdict for P. Was this correct? Why?

1. The first part of the document is a letter from the President of the United States to the President of the Senate, dated January 1, 1901. The letter is signed by William McKinley and is addressed to John D. Long. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed amendments to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which were adopted by the General Assembly of the United Nations in December 1979. The Commission is therefore unable to report on the progress of the work of the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) in this regard.

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

[illegible]

14. P. a boy about 15 years old, while in the observance of due care in walking along one of D's much used sidewalks, elevated about 6 feet above the ground and unguarded was either inadvertently pushed off by the shoving of one boy by another against him, and was severely injured. It was contended that even if D. was negligent in leaving such an unguarded walk, D. was released by the negligent act of the boy doing the pushing. Jury gave verdict for P. Was there error? Why?

15. P. was an outside passenger on an omnibus between H. & K. In descending a hill, the 'bus overtook a cart, and in order to pass it pulled to one side on to the tram car track; a tram-car was at the time coming up the hill; its driver made no effort to stop, but ran into the 'bus, and P. was injured. He sued D. the owner of the tram car line. The judge charged that in order for P. to recover the jury must find that the injury to him was due solely to D's act. Was this error? Why?

16. P. sued D., a R. R. Co. for injury by fire to P's woods, alleged to be due to D's negligence in the construction and management of its engines. D. asked the court to charge that if, after discovering the fire, P. neglected to use reasonable and practicable means to suppress it, he could not recover for subsequent damages. This was refused. Was there error? Why?

17. D. owned land used for athletics, adjoining a private road with a foot way along side. To prevent persons driving vehicles up to the fence and looking at the sports, D. placed wooden barriers filled with projecting spikes across the road-way, leaving a place wide enough to drive through, but which was closed by a pole when the sports were going on. P. having occasion to use the road one dark night, by feeling his way passed safely through the opening in the road, and then turned toward the foot path, where he came in contact with one of the barriers which had been removed by an unknown person from the road way and stood up along the side of the foot way. It was admitted that D. was negligent in placing the barriers in the road. Was he liable to P? Why?

18. P's servant S. a boy, got into a quarrel with D. in the street. D. took after S. with an axe, and I in order to save himself ran into P's store, and back of the counter; in doing so S. ran against the faucet of a wine cask, knocked it out, and the wine was lost. P. sued D. for the loss. Is D. liable? Why?

The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's development.

The second part of the report deals with the economic situation of the country. It is a very interesting and informative study of the country's economic development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's economic development.

The third part of the report deals with the social situation of the country. It is a very interesting and informative study of the country's social development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's social development.

The fourth part of the report deals with the political situation of the country. It is a very interesting and informative study of the country's political development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's political development.

The fifth part of the report deals with the cultural situation of the country. It is a very interesting and informative study of the country's cultural development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's cultural development.

19. Fire from D's locomotive upon an elevated railway fell upon a horse attached to a wagon below, and upon the hand of the driver, causing the horse to run away. The driver after failing to stop the horse by running him into a post, intentionally turned him against the curb stone; the wagon however passed over the curb, the driver was thrown out, and P. was run over and hurt. It was admitted that D. negligently allowed the fire to escape. Is he liable to P? Why?

20. P. was engaged to marry B; D. falsely slandered P. by words not actionable in themselves, spoken to B. whereby B. broke the engagement with P. P. sued D. Is she entitled to recover? Why?

21. P. had entered into a contract with X., whereby the latter, who was an expert, undertook to manufacture for P. out of materials furnished by the latter, all of a certain kind of brick, and at the time, required by P., and not to engage in the service of any one else for 5 years. D. knowing of the relation existing between P. and X. wrongfully induced X. to leave P. and make the same kind of brick for him. P. sued D. can he recover? Why?

22. P. was the owner of valuable buildings, upon lots adjoining a city street, on the opposite side of which was a river. D. a railroad company, filled up a portion of the river here, and occupied it with its tracks, yards, etc., increasing the distance to the river from P's buildings nearly 800 feet; a fire accidentally started in P's buildings, and because of the increased distance the fire department's hose would not reach the river so as to get water to put out the fire. P. sued D. for the loss resulting. Can he recover? Why?

23. D's horse strayed on to the highway, and while there kicked P's child, the latter not being negligent. D. had no reason for thinking the horse was vicious. P. sued D. for loss of service shown. Should he recover? Why?

24. D's horse strayed upon P's land, and while there kicked and seriously injured one of P's horses; P. sued D. Should he recover? Why?

25. D. a deliveryman left his horse and wagon standing in the street unwatched and unhitched for about half an hour. Several children gathered around the wagon, and P. a boy between 6 and 7 years old undertook to climb over the wheel

[illegible][illegible]

... ..  
... ..  
... ..  
... ..  
... ..  
... ..  
... ..  
... ..

[illegible]

SECRET  
NO FOREIGN DISSEM

DECLASSIFIED BY: [redacted]  
ON: [redacted]



into the wagon, just as another boy began to lead the horse forward. P. fell off and was run over and seriously hurt. He sued D. Should he recover? Why?

26. P. was owner of a donkey; he tied his feet together and turned him out into a narrow road to pasture. Some distance away there was somewhat of a hill in the roadway; D., who had occasion to pass on the road with his team and wagon, was walking along back of the wagon, when it reached the top of the hill; the horses then started to go much faster, and going down the hill at a "smartish pace" left D. at a farther distance behind. In going down the hill the team and wagon veered off to the side of the road and ran over the donkey, seriously injuring it. P. sued D. Should he recover? Why?

27. D. negligently left a pole across the street in front of his house which he was repairing. Near dusk in the evening, but while the pole was easily visible 100 yards away P. came riding along at a rapid pace, his horse stumbled over the pole and P. was injured. He sued D. Should he recover? Why?

28. D. constructed a buggy for C., but did it negligently and defectively. C. sold the buggy to E. Soon afterward E. and P. were riding in the buggy, and because of the defect, it broke down, and P. was hurt. He sued D. Can he recover? Why?

29. P. purchased a ticket from Cincinnati to New York over the fast train to go by Pittsburg. Owing to the negligence of D's agent at Cincinnati in labeling P's baggage, this was transferred at Pittsburg to a slower train, which with the baggage, was destroyed in the Johnstown Flood. P. sued D. for the loss. Should he recover? Why?

30. D. and P. were standing near a ditch when they got into an altercation. D. wrongfully assaulted P., knocking him down, P. falling into the ditch and broke both arms. P. sued D. for the whole damage? Is he so liable?

The first of these is the fact that the
 majority of the population of the
 United States is of European
 descent. This is a fact which
 has been recognized by the
 government for many years.
 The second fact is that the
 majority of the population of
 the United States is of
 European descent. This is a
 fact which has been
 recognized by the government
 for many years.

1. The first and most important step in the process of the development of a new product is the identification of the market need. This is done by conducting market research, which involves gathering information about the target market, its size, and its needs.

[illegible]

1. The first part of the document is a letter from the President of the United States to the President of the Republic of China, dated January 1, 1955. The letter is signed by Dwight D. Eisenhower and is addressed to Chiang Kai-shek. The letter discusses the relationship between the United States and the Republic of China, and the importance of the Republic of China in the Pacific region.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

L E C T U R E S

O N

THE FUNCTION OF THE FINANCIER IN INDUSTRY.

B Y

THOMAS L. GRIENT,

(Manager of Audit Company of New York).

-----

Reported by A. C. Heckler.

-----

U N I V E R S I T Y O F M I C H I G A N.

-----

Edwards Bros.-----Publishers.

Ann Arbor, Mich.

1901.

1000 1000 1000 1000

1000 1000

1000 1000 1000 1000

1000 1000

1000 1000

1000 1000 1000 1000

1000 1000

1000 1000 1000 1000

1000 1000

1000 1000

## LECTURE I.

-----oOo-----

In appearing before you this afternoon for the first of our talks on the function of the financier in industrial organization, I feel like beginning with the sentiment which Goethe puts in the mouth of Mephistocles, who is asked: "Are you a virtuoso"; to which he replied "O no; the wish is great; the skill is only so so".

That this is the true attitude of mind in which to approach the subject under discussion will appear clear to you I am sure as we proceed. There is as yet no science of industry; nor as yet a standard of industrial ethics; nor can we suggest any concrete statement even from the business point of view of the exact conditions of industrial safety. The circumstances of the case require that I should merely explain some of the actual practices which prevail in the industrial world and the reasons which have thus far influenced our captains of industry and finance.

While the latter about which I shall talk to you relate also to small corporations, firms, and individuals also, they are really thrown into clearer light by considering them in relation to large corporations.

Let us begin with the promoter. It is not long ago since the promoter was thought to be in a pretty poor business. I remember a case where a man was sued for calling another a promoter, on the ground that it was an opprobrious epithet. Indeed the record of the promoter up to recent years has not been altogether clean. Misleading statements were made to secure desired co-operation, and other dishonest practices. Indeed to the old time promoters might be applied the remark once made by Senator Depew when speaking of certain railroad men, that the Recording Angel followed them around with a bucket of tears and blotted out what they said".

And yet I am inclined to think that even in those early days the promoter sinned as much from lack of knowledge and from force of circumstances as from deliberate intent. Ignorant as the investing public in those days were of the first principles of industrial success, no statements could claim their attention which were not ornamented by presentations very alluring.

But modern conditions require the promoter to be a different being. His difficulties are great; and so are his re-

[illegible][illegible]

1. The first of these is the fact that the
 2.
 3.
 4.
 5.
 6.
 7.
 8.
 9.
 10.
 11.
 12.
 13.
 14.
 15.
 16.
 17.
 18.
 19.
 20.
 21.
 22.
 23.
 24.
 25.
 26.
 27.
 28.
 29.
 30.
 31.
 32.
 33.
 34.
 35.
 36.
 37.
 38.
 39.
 40.
 41.
 42.
 43.
 44.
 45.
 46.
 47.
 48.
 49.
 50.
 51.
 52.
 53.
 54.
 55.
 56.
 57.
 58.
 59.
 60.
 61.
 62.
 63.
 64.
 65.
 66.
 67.
 68.
 69.
 70.
 71.
 72.
 73.
 74.
 75.
 76.
 77.
 78.
 79.
 80.
 81.
 82.
 83.
 84.
 85.
 86.
 87.
 88.
 89.
 90.
 91.
 92.
 93.
 94.
 95.
 96.
 97.
 98.
 99.
 100.
 101.
 102.
 103.
 104.
 105.
 106.
 107.
 108.
 109.
 110.
 111.
 112.
 113.
 114.
 115.
 116.
 117.
 118.
 119.
 120.
 121.
 122.
 123.
 124.
 125.
 126.
 127.
 128.
 129.
 130.
 131.
 132.
 133.
 134.
 135.
 136.
 137.
 138.
 139.
 140.
 141.
 142.
 143.
 144.
 145.
 146.
 147.
 148.
 149.
 150.
 151.
 152.
 153.
 154.
 155.
 156.
 157.
 158.
 159.
 160.
 161.
 162.
 163.
 164.
 165.
 166.
 167.
 168.
 169.
 170.
 171.
 172.
 173.
 174.
 175.
 176.
 177.
 178.
 179.
 180.
 181.
 182.
 183.
 184.
 185.
 186.
 187.
 188.
 189.
 190.
 191.
 192.
 193.
 194.
 195.
 196.
 197.
 198.
 199.
 200.
 201.
 202.
 203.
 204.
 205.
 206.
 207.
 208.
 209.
 210.
 211.
 212.
 213.
 214.
 215.
 216.
 217.
 218.
 219.
 220.
 221.
 222.
 223.
 224.
 225.
 226.
 227.
 228.
 229.
 230.
 231.
 232.
 233.
 234.
 235.
 236.
 237.
 238.
 239.
 240.
 241.
 242.
 243.
 244.
 245.
 246.
 247.
 248.
 249.
 250.
 251.
 252.
 253.
 254.
 255.
 256.
 257.
 258.
 259.
 260.
 261.
 262.
 263.
 264.
 265.
 266.
 267.
 268.
 269.
 270.
 271.
 272.
 273.
 274.
 275.
 276.
 277.
 278.
 279.
 280.
 281.
 282.
 283.
 284.
 285.
 286.
 287.
 288.
 289.
 290.
 291.
 292.
 293.
 294.
 295.
 296.
 297.
 298.
 299.
 300.
 301.
 302.
 303.
 304.
 305.
 306.
 307.
 308.
 309.
 310.
 311.
 312.
 313.
 314.
 315.
 316.
 317.
 318.
 319.
 320.
 321.
 322.
 323.
 324.
 325.
 326.
 327.
 328.
 329.
 330.
 331.
 332.
 333.
 334.
 335.
 336.
 337.
 338.
 339.
 340.
 341.
 342.
 343.
 344.
 345.
 346.
 347.
 348.
 349.
 350.
 351.
 352.
 353.
 354.
 355.
 356.
 357.
 358.
 359.
 360.
 361.
 362.
 363.
 364.
 365.
 366.
 367.
 368.
 369.
 370.
 371.
 372.
 373.
 374.
 375.
 376.
 377.
 378.
 379.
 380.
 381.
 382.
 383.
 384.
 385.
 386.
 387.
 388.
 389.
 390.
 391.
 392.
 393.
 394.
 395.
 396.
 397.
 398.
 399.
 400.
 401.
 402.
 403.
 404.
 405.
 406.
 407.
 408.
 409.
 410.
 411.
 412.
 413.
 414.
 415.
 416.
 417.
 418.
 419.
 420.
 421.
 422.
 423.
 424.
 425.
 426.
 427.
 428.
 429.
 430.
 431.
 432.
 433.
 434.
 435.
 436.
 437.
 438.
 439.
 440.
 441.
 442.
 443.
 444.
 445.
 446.
 447.
 448.
 449.
 450.
 451.
 452.
 453.
 454.
 455.
 456.
 457.
 458.
 459.
 460.
 461.
 462.
 463.
 464.
 465.
 466.
 467.
 468.
 469.
 470.
 471.
 472.
 473.
 474.
 475.
 476.
 477.
 478.
 479.
 480.
 481.
 482.
 483.
 484.
 485.
 486.
 487.
 488.
 489.
 490.
 491.
 492.
 493.
 494.
 495.
 496.
 497.
 498.
 499.
 500.
 501.
 502.
 503.
 504.
 505.
 506.
 507.
 508.
 509.
 510.
 511.
 512.
 513.
 514.
 515.
 516.
 517.
 518.
 519.
 520.
 521.
 522.
 523.
 524.
 525.
 526.
 527.
 528.
 529.
 530.
 531.
 532.
 533.
 534.
 535.
 536.
 537.
 538.
 539.
 540.
 541.
 542.
 543.
 544.
 545.
 546.
 547.
 548.
 549.
 550.
 551.
 552.
 553.
 554.
 555.
 556.
 557.
 558.
 559.
 560.
 561.
 562.
 563.
 564.
 565.
 566.
 567.
 568.
 569.
 570.
 571.
 572.
 573.
 574.
 575.
 576.
 577.
 578.
 579.
 580.
 581.
 582.
 583.
 584.
 585.
 586.
 587.
 588.
 589.
 590.
 591.
 592.
 593.
 594.
 595.
 596.
 597.
 598.
 599.

and the first chapter is devoted to the  
and the second chapter is devoted to the

wards if he is successful. I suppose all of us have had some experience in trying to persuade a number of our fellowmen to follow some line of action, perhaps in political affairs, perhaps in college affairs, in which they were interested only as good college men or good students; and you know how hard it is to persuade a set of men to do something, of that sort which you think possibly is for the best interests of those very persons, and for the college as well. From this we may judge of the character of the difficulty of reconciling a number of opposing manufacturers, who have exaggerated notions of the value of their own property, and anxious to take advantage of every shift and turn which the negotiations may take. The man who can marshall these forces, by cajoling here and persuading there, by appealing to individuals both in public and private, not forgetting during all this time that the outcome of his negotiations must be such as will appeal to financial men as sound, and to business men as founded on good business principles, the man who by natural gifts and by hard labor succeeds in constructing out of such warring elements a combination that will stand the test of close examination, is one who deserves rewards.

It is often impossible that merchants and manufacturers can form a combination or consolidation of themselves. It may be that trade wars and trade jealousies have been carried so far that prominent men do not care to speak to each other if they meet; or if preserving a degree of politeness toward each other, they still have feelings of dislike or aversion.

I would say, however, that I happen to have with me for your use articles of agreement of one of these consolidations which was put together by the people themselves. The leading manufacturers got around a table and threshed it out. It is an ideal plan.

It is very unusual to find a combination of opposing interests where a very large proportion of the total capitalization must be raised in cash before the plan is consummated. A few years ago it was indeed possible in a few instances to sell almost the entire capitalization of stocks and bonds, to the public at prices which enabled the promoter to pay each manufacturer his price in cash and have a large sum left over for himself. But those days are gone and seen never likely to return. At the present time no plan of consolidation or enlargement can be financed in Wall Street where the manufacturers about to be combined demand any considerable proportion of the valuation of their business in actual money. It is found by financial people that it is not good policy to buy out manufacturers, as they believe

The first part of the document is a letter from the President of the United States to the President of the Senate, dated January 1, 1901. The letter is signed by William McKinley and is addressed to John D. Long. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States.



that the manufacturers should not ask investors to purchase shares which they themselves are not willing to receive.

Another matter which has forced its attention on Wall Street by experience is that if the consolidation is established on conservative lines the promoter should be willing to accept for his services a proportion of the common stock of the new company, and that the bonds or preferred stock of the proposed company should be reserved for sales to the public, and other purposes. This is a safe test which the ordinary investor can apply to a great many of these corporations. It is considered now a mistake in the ethics of financing for the promoter or anybody concerned to take any of the bonds or preferred stock and put it in his own pocket.

To go back a moment, I was asked before the Industrial Commission whether it would not be advisable for us to have laws passed which should define the status of the prospectus, and also state what the promoter was doing, the details of his plan, etc. As regards the prospectus, I am inclined to think that if we had had such a law perhaps twenty years ago it would have been good for us, but we could hardly expect it, because it is too much to think that the commercial situation shall be anticipated by law. The trouble with a great deal of the conditions which we are discussing, and which some of us think are of grave concern, is largely due to the fact that the pace of our commercial development has been so swift that the ethics of the case have not had a chance to catch up. The public conscience, the public intelligence, must have a chance to think over these things, before we can make up our minds what we ought to do, and of course by that time a good deal of wrong perhaps has been done. At the same time I am not at all desirous of speaking against those persons who take advantage of that circumstance, because it may be, and very likely is, in a great many cases, they are themselves as ignorant of the ethics of the case as the parties with whom they are dealing. Something of that kind should be thought of I think when discussing such a career, for example, as the late Mr. Jay Gould. Mr. Gould was in advance of his time. He did a great many things which we now believe to be wrong, and which therefore would not be done, and I might almost say could not be done in Wall Street today. You know it is the boast of the law of England that they keep pace with the development of commerce, and there is a great deal to be said in favor of that view. But that has been exceedingly difficult of late years.

It is sometimes said that the tendency is to eliminate the work of the promoter on the one hand, and restrict his rewards on the other. For myself I see no reason why the office



of the promoter should die out; but on the contrary I think it is becoming a recognized and reputable business. For promoting if done thoroughly and conscientiously, with reference not only to the combining or enlarging of the companies, but also to the investing public, is advantageous to all concerned.

The best instance of a successful promoter at the present time is Mr. Charles R. Flint. I would say, however, that Mr. Pierpont Morgan is not regarded as a promoter, in the sense in which I am now talking to you, but as a banker. Mr. Flint is so successful with his companies that he can borrow unlimited capital without security. I think it would require a number of failures on Mr. Flint's part before his credit could be reduced very materially; because though a reputation is one of the hardest things to build up in New York City, it is equally hard to destroy when once made.

Mr. Flint is so successful about these things that he will no longer go about the country suggesting to people to consolidate their businesses. He will take up no business until the people themselves come to him and ask him to put them together. On the other hand, this great combination that has just been formed, the steel trust, there is every reason to believe was actually thrust on Mr. Pierpont Morgan; he not only did not solicit it but he did not want it; but he had to take it from his point of view.

Financiers are not now satisfied with general statement and glowing descriptions. There must be a thorough examination of existing conditions. A Wall street man will touch no plan no matter how glowing the future, until you tell him what has been done in the past.

It requires a vast range of general information, together with a close knowledge of business, to look very far into the future of an enterprise. In the study of the conditions of business success, I have sometimes thought that we do not make enough of the use and training of the imagination, so that the mind may leap freely yet truly from the known to the wholly or partly unknown. Why is the opinion of Secretary Gage of value when the opinion of somebody else would be disregarded. There is first, the knowledge of some facts; second, experience; third, the possibility of the use of what we call imagination. Such a combination of knowledge and imagination is needed and when found is a man deserving of great reward. He is especially needed at this time when the brightest of all are in doubt as to exactly how all these various industrial combinations are really coming out. I do not mean from the point of view of the legislature, but from the point of view of the investor. It is a very interest-



int subject and it is largely speculative in the good sense of that word.

Generally speaking the result of the tendency in Wall Street today is to eliminate chance. The effort of every man who wants to make any money in Wall Street or business is to do away with uncertainty, and this is a very powerful factor in broadening our view of industrial conditions.

The danger to the banker and investor is inaccurate or inadequate information. I have been talking as you will notice about the investor, and have said nothing about the consumer. I do not know that this evening is a proper time to talk on that subject, but I do think that a great deal of our troubles about the consuming public would be done away with were we to keep our eye a little closer on the investor.

Twenty years ago, as I said, we might possibly have been better off had we had some such law as there is in the English law, to protect investors who purchase under the terms of the prospectuses, but we are not altogether helpless. The general law of each state in the union is a protection. I myself know of two instances within a year and a half in which the promoters and the banking house that brought out one particular company were sued or threatened suit by the underwriters for obtaining money under false pretenses, and they had to compromise.

But the greatest protection the investor has at the present time is not in the law, strictly speaking, but in the reputation of the banking houses who finance and bring out these various projects. Unless you happen to know something about it you will be surprised at the care with which the banking houses investigate these various projects, because the reputation of these houses is their most valuable asset, and it would be the greatest folly on their part to put out enterprises that were doomed to failure.

There is another phase of Wall Street as a financial center. You know that foreign nations have lately been coming to Wall Street borrowing money. You know there has been a great demand for money and at the same time rates of interest on good securities are ruling lower than ever before. There is a matter that deserves attention. The amount of money which is in what I may call a semi-trust is increasing in great rapidity. The

...the ... ..

...the ... ..

...the ... ..

...the ... ..

...the ... ..

...the ... ..

...the ... ..

three great life insurance companies in New York City have each of them invested assets over two hundred fifty millions. It is hard for the mind to comprehend the meaning of such a sum. You can see the importance of very carefully selecting the investments of those companies. All this increased volume of money which is seeking investment means increased prosperity and increased civilization. That is the reason why good investments rule at such high prices, or what is the same thing, low rates of interest,  $3\frac{1}{2}\%$  for example.

Values in Wall Street are made up of two or three different things. One of the factors is the intrinsic value of the property; another is the sentimental value; third, the state of the market in general, whether money is available for borrowing purposes.

New York City is not yet the financial center of the world. Some of our newspapers are calling attention to the fact that it is, but I hardly think we can say that. But certainly this country has taken on a most marvellous growth, not only in the way of business, but as a financial center, and of course New York is the headquarters of that. It may be that with the growth of business in the U.S., and with the growth of facilities which we now lack for international banking, we may attain the position which London now occupies. Today London has its branches all over the world, and when we do our foreign banking we do it through London. The United States has advanced so greatly in industrial matters and the future is so bright with possibilities, that we ought never again to have such a panic as that of 1893. These combinations, if they do not do anything else, steady the fall of prices, or they steady advances.

-----oOo-----

March 19, 1901





## LECTURE II.

-----000-----

You remember we closed yesterday by saying that the danger to the banker and investor is inaccurate or inadequate information. This afternoon I propose to spend a greater part of the time in talking to you about details, and what is meant by inadequate or inaccurate information.

The question of accuracy of information is a most important one. Long experience has taught the bankers that the statements of manufacturers and business men may be misleading from the banker's point of view.

The vast majority of merchants and manufacturers are honest. Because of years of experience I am able to state this as a fact of my own knowledge. But it is also fair to say that there is among them a wide divergence of opinion as to what constitutes profit.

You will hear it said occasionally that good will is water and it should be all squeezed out, but that is an erroneous view. There is a sense in which the good will is just as fair and honest an asset of the company as the plant. The difference is that it is much harder to value. The patents, trade-marks, the processes of manufacture, the reputation, the methods of distribution, all these go to make up what we call in one word good will.

Patents ought not to be stated in a balance sheet. It is impossible for me or anybody to state off hand what a patent is worth. A patent is worth what it is worth as earning power to the person who possesses it. There is no other way of valuing it. Therefore we say that patent is included in the term good will.

If you will turn to Article II, of the Consolidation Agreement, which you have, you will notice it says: "The total value of the tangible property shall be paid for in preferred stock in cases where the earnings of the company are at the rate of 8% per annum." Further on we find that intangible property is to be paid for in common stock.

Now tangible property consists first of all in the land and the buildings which are upon that land; next, the stock of supplies and machinery that is on hand and necessary for the business; and the accounts of customers should also be considered as tangible property.

Now two things must be taken into consideration: the cost of the plant and the earning power of the industry.



Now unless the business requires an investment in lands, machinery and the like of a total sum of money to be represented by the proposed issue of bonds, competitors may easily arise since but little capital is required. Moreover, in case of failure, the bond holders might find themselves with no property to foreclose upon. That fact should be taken into consideration by investors. On the other hand, if the property is costly, though the earnings are small, the bond holders in case of disaster, might find themselves in possession of the plant, which indeed might have cost more than the bonds, but which would bring very little in the market, and this is because the buildings and machinery might be often useless for any other purpose.

You will notice that the Articles of Agreement state that the "Plants shall be appraised at their value today to a going concern for the purpose for which used, based upon the present cost of construction."

The phrase "going concern" is important. It would be manifestly unfair for a corporation to be forced to dispose of its property at what they would bring at a forced sale. That is not a fair valuation. The phrase "going concern" means that the property is to be valued for the purpose of the business to be continued as a business.

In any case the true appraiser should take into account the original cost, wear and tear, and efficiency as measured by the latest improvements, as well as by the average duration. Efficiency is a very serious word, and this is especially true when we come to talk about machinery. The efficiency of a building is not so much in question as the efficiency of machinery. Nothing is more striking to a foreign observer in American industrial methods than the willingness with which our foremost manufacturers will throw out machinery that is apparently as good as new, and substitute other pieces of machinery which are much more efficient. And when we consider the value of machinery, that fact must be taken into consideration.

The depreciation of machinery is a phrase by which we attempt to show what proportion of the original value of the machine has been lost by use or otherwise. What that is, or what the depreciation on a building should be is different in all different kinds of business.

The question what constitutes profit is a somewhat complicated one, in which certain general elements enter, and where the special conditions of the business are also important factors.

The appreciation of land should be eliminated from such statements. Many concerns established years ago in the then suburbs of our large cities find themselves now in possession

The first thing I noticed when I stepped out of the plane was a sense of relief. The air was fresh, and the sun was shining. I had been in the hospital for a long time, and I was finally home. I had been told that I would be discharged, but I wasn't sure if it was for good. I had been in the hospital for a long time, and I was finally home. I had been told that I would be discharged, but I wasn't sure if it was for good. I had been in the hospital for a long time, and I was finally home. I had been told that I would be discharged, but I wasn't sure if it was for good.

The first thing I noticed when I stepped out of the plane was a sense of relief. The air was fresh, and the sun was shining. I had been in the hospital for a long time, and I was finally home. I had been told that I would be discharged, but I wasn't sure if it was for good. I had been in the hospital for a long time, and I was finally home. I had been told that I would be discharged, but I wasn't sure if it was for good. I had been in the hospital for a long time, and I was finally home. I had been told that I would be discharged, but I wasn't sure if it was for good.

The first thing I noticed when I stepped out of the plane was a sense of relief. The air was fresh, and the sun was shining. I had been in the hospital for a long time, and I was finally home. I had been told that I would be discharged, but I wasn't sure if it was for good. I had been in the hospital for a long time, and I was finally home. I had been told that I would be discharged, but I wasn't sure if it was for good. I had been in the hospital for a long time, and I was finally home. I had been told that I would be discharged, but I wasn't sure if it was for good.

of cities, which owing to the growth of those cities, are worth more than their original cost. Certainly the owners of the factory are entitled to take credit for the appreciation in making up their statement for the bankers, but in what way? It is clear that such increase in the land is not a manufacturing profit. It was not earned in manufacturing and can not be relied upon for dividends in the future. In a fair statement therefore of the profitability of that business, this item must be thrown out. But on the other hand in stating the amount of assets, the land should be put down at its present value and payment made on that basis.

This question is sometimes a troublesome one. A case came up recently in which the owners of a business stated that they did not wish any depreciation charged off from their earnings, because their land had increased in value. They were quite right from their point of view. But if you were asking at the same time what they had earned during the year, that depreciation must be taken care of.

This increase in the value of land comes up in another way when it is proposed to increase the stock of a corporation. If there are more assets they would have theoretically a right to increase the stock on the other side, but the question whether it is good policy is another matter, because if the earnings of the company were not increased it would be foolishness to increase the value of the stock.

A troublesome matter in the net earnings of a company is depreciation. Not only must the plant be kept in good order and repair, but something should be set aside for the replacement of the plant. As already stated the appraisors should consider the efficiency of the machines and also the possibility or probability of a supercedure of the old by the new.

I have found by experience also that there should be taken into account a certain sum in reserve against bad debts, which will vary according to the class of business.

I call attention to a point in the paper which states that all repairs shall be charged back again in the earnings, and then a certain percent shall be taken. That is one method in this case of making all the plants stand on a firm and even basis, because as is well known the style of management of manufacturers differs greatly.

There is another thing which is troublesome; the question of the cost of management. When you come to a corporation of course you pay a certain amount of salaries; but in firms or co-partnerships, it is quite common for the partners to divide the earnings without reference to their own services.

1

•

• 1

70

30  
2

2

1

1

10

2. If

—

— — —

1

I suppose I have had as many fights about that as anything, because in stating the earnings of a corporation we always deduct a certain amount for salaries, while two partners, if they are both engaged in business, will say, no, that is not fair. I say it is, because you must remember that the examinations are made for the purpose of determining the possibility of earnings for the future, and of course your company must have its management salaries charged into it.

This examination is important in certain kinds of business where the consolidation is complicated, in order that all parties may be put upon an equality. And especially in new corporations there must be a careful estimate of the depreciation, so that the net earnings may not in the first few years be overstated. A new trolley railroad will supply an example of this. The equipment will wear out and require replacement at intervals of five to fifteen years. Now some provision should be made during these first years for this inevitable expenditure. Otherwise these new replacements would come on all of a sudden and they would have no money at all to devote to them and the road would have to go into bankruptcy.

On the other hand a carefully located surface railway usually creates new traffic which may fairly be counted on in the future to offset in a measure these depreciation charges.

I stated a moment ago that while most manufacturers were honest they did not always know what profit consisted of. Perhaps I may illustrate my meaning by a concrete instance. There was a manufacturer in Ohio whose plant was worth \$500,000. and in order to escape taxation he wrote down the plant to \$250,000., and he took from that side of the account \$250,000. and charged it to Profit and Loss account. Profit and Loss account has two meanings. One is that it shows the assumed or estimated excess of the value of the assets ~~max~~ over the liabilities. But there is another sense in which a profit and loss or surplus account represents the earnings of the company over and above what has been paid out in dividends; and that is the true way of keeping a profit and loss account. What this man did was to take \$250,000. out of the plant on one side and put it with profit and loss on the other. In making the statement of his property to the men who were to do the combining in New York City he stated his profits were \$500,000. a year. It was reported afterwards that his profits were \$250,000. He had added to his profits what he had taken from the plant for taxation purposes, which was rank nonsense. There is an actual instance





of a perfectly straightforward man who claimed his profits were twice what they really were.

There is another thing we have to look out for, and that is the statement of averages. As you know, the business of the country has been very prosperous for the last three years; but before that time manufacturers had a hard season of it. There is another curious fact in connection with this. The financial panic as you know happened during the summer and fall of 1893; values fell in Wall Street and the people who had anything to do with stocks and bonds were in a hard time. I know from my own experience that the manufacturers of this country speaking generally did not feel the effects of that panic until two years afterward. Their hard times began in 1895, and in the latter part of 1897 their earnings began to improve; in 1898 they had a fairly good year; and in 1899 a boom year.

Now you will see that in estimating on these things if we should take the last two years and make a statement of the profits of these manufacturers it would be correct and at the same time misleading. If we should capitalize a company on the earnings of the last two years, an iron company particularly, and there should come another hard time in America two or three years from now, we might lose our whole investment.

Therefore the thing to do is to make a statement showing what the profits were in good years and what in bad years. Then if the profits in bad years were enough to support the preferred stock and in good years to pay dividend on the preferred stock, then we can say to ourselves that our investment is reasonably safe. That is what financial people are striving to do.

I want to say to you that there is no science of book-keeping. Book-keeping is an art, the art of putting down facts. There is no magic about it. The thing for us to do as business men is to see what the facts are, and after that it is a comparatively simple matter to express them in figures. The worst set of books I ever saw were perfectly correct, but they were very misleading.

Another thing is the matter of inventory. I suppose you know that every manufacturer or trading concern at least once a year must take an account of the amount of articles on hand, and they put on them a certain set of prices, and that is taken into their accounts. There is only one way in which a manufacturer can make money and that is by the sale of his goods. Now if during the year he has bought a large quantity of material more than he has been able to turn into goods and sell, it is



evident that unless he takes that fact into consideration his earnings can not be correctly stated. This is a very simple matter apparently, but there are some very grave issues involved.

If you will bear in mind the statement I made a moment ago that profits must come from manufacturing, you will see that it is in a book-keeping sense perhaps perfectly right, but in a commercial sense wrong to make the inventory include those profits, because this inventory is merely an adjustment and is ~~not~~ to find out what the selling profits were.

If you bear that in mind you will see the point when I say to you that there is a controversy going on all the time in regard to that inventory.: Some of our steel companies perhaps during the year 1899 or 1900 found themselves in the possession of material on hand which had increased at least 50% over their cost price. Now how should that be taken in the inventory? They said, let us put it in at 150% instead of 100%. That seems on the face of it very fair, but the difficulty is that the moment you do that, you increase their profits during the year by just that 50%. There is a dispute about that. My opinion is that it is a dangerous way of doing business.

On the other hand let us come down to the present time, with a falling market. You know a gradual and steady fall in the market prices tests the virtue of the manager of a trading or manufacturing company very much. It is easy enough to make money on a rising market. But on a falling market it is a different thing. You have got to keep your factory going and you must have these supplies, and you have got to keep buying, but every time you buy you lose money. At what price will they take inventory? They say, take in at what it cost us. It is better to take it in at what the cost price is at that time. If you do not do that you are simply holding up a certain amount of profits which really should be taken because when this material comes to be made up into manufactured goods and sold you will have a very low profit. So the best rule about that is that the material should be taken into your accounts at the cost price or at the market price, whichever is lower, and then you will leave the manufacturing clear.

There is another point about that. In certain lines of trade they manufacture on future orders. For example, in the knitting goods industry, they begin orders during the winter for delivery the next fall. They have quite a number of suits of underwear made up and they are in the habit of taking this into their accounts at the prices these people have agreed to pay next fall. They should put it down at the cost of manufacture.

[illegible]

There is another thing I should mention at this time. They usually have a small boat with them, and they will take you to the beach. The boat is usually a small motor boat, and they will take you to the beach. The boat is usually a small motor boat, and they will take you to the beach. The boat is usually a small motor boat, and they will take you to the beach.

## L E C T U R E III.

--oOo--

We did not quite finish yesterday on one or two points. On the question of inventory I am not sure that I made myself plain to you, in saying that a corporation or merchant should take inventory at prices which are either cost or market, whichever is lower of the two. I want to say to you that that is the conservative practice; but also it is fair to say that the manufacturers and merchants themselves do not all agree with that view.

Now in regard to depreciation. You remember in mercantile affairs I told you that in machinery and the like of that we must have the best expert knowledge we can get. We are obliged to charge against the profits a certain proportion, on the ground that the efficiency or possibility of a new invention may decrease the life of that machine, say ten years. We would then have one tenth of the value of that machine to charge off every year, if the estate has a reserve fund.

It must be known to you gentlemen that are interested in transportation that that is not the way the railroads manage their affairs. The railroads have been running for so many years that it has become almost an axiom with them that a certain amount of replacement must be made every year, and any charges that they put in are practically the same thing as we were talking about a moment ago in mercantile affairs in putting at one side something to replace machinery. Nevertheless it is my private opinion that it would be better if the railroads would all of them make an exact study of their whole physical plant and find out the life approximately of all ties, rails, bridges, etc. and then make a calculation as to the average amount that would be required year by year, to be put aside to replace them. This amount is charged into the expense account. But remember that the charging of that into the income account does not mean that they have spent it, as they have exactly the same thing. It is only a question of clearness in stating the condition of the business. You know that it is the practice of every railroad company just the moment hard times come upon them to stop replacing cars, tracks, etc., and then when they get to a year of prosperity they put more than they ought to in repairs.



I am asked to explain the essential difference between bonds and stocks. A bond holder is a creditor of the company. He has loaned the company money at a fixed rate, and he has nothing to do with the success of it except so far as it may relate to the safety of the investment. He wishes to be sure that his investment is safe. Therefore the bonds that are sold in the street are usually issued to about 50% or one half of the value of the plant. In some states it is absolutely illegal to bond then for tangible assets such as accounts receivable, but whether it is absolutely illegal or not, it is worthless because they are not property that you can foreclose upon.

On the other hand the owner of the stock of the company is a partner in the enterprise. He is to participate in the profits or losses.

Preferred stock is an attempt to make you a partner in the enterprise but at the same time to secure you to a certain extent; so that preferred stock can be made to cover a larger amount of assets than bonds. It is limited to a certain percentage but it is cumulative, and if they do not pay you one year they must the next if they earn it. Preferred stock gives you no such remedy as the bond holder in allowing you to foreclose, but it has a cumulative remedy and that is all.

In the Royal Baking Powder Company they have a plan which is very successful. They wanted some working capital so they sold preferred stock. Now that preferred stock has no voting power in this case. It is simply a promise to pay 6% on the preferred stock, and as long as those payments continue you have nothing to do with it, but the moment they do not pay the preferred stock, the preferred stock have a right to call directors together and run the company. That is a very good way to furnish additional capital for a business. It makes the preferred stock perfectly secure, so far as any stock can be secure .:

Turning now to the Articles of Consolidation which you have, you will notice it says that, after stating how the earnings should be ascertained: "the balance of the said average annual earnings so ascertained, shall be deemed for the purpose of this agreement the net profits of the respective vendors to be severally multiplied by 10." The effect of multiplying the net earnings of this company by 10 is to capitalize it at a rate which on the face of the figures will give 10%.

Now it says: "Provided, however, that in case it shall be found that the aforesaid multiplier of 10 will produce a grand aggregate of common stock greater in amount than the grand aggregate of preferred stock, the Executive Committee shall choose

1951. *Journal of the Royal Society of Medicine*, 44, 101-104.

1000

100

: 9 :

1.  $\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$

1. The first of these is the fact that the
 2.
 3.
 4.
 5.
 6.
 7.
 8.
 9.
 10.
 11.
 12.
 13.
 14.
 15.
 16.
 17.
 18.
 19.
 20.
 21.
 22.
 23.
 24.
 25.
 26.
 27.
 28.
 29.
 30.
 31.
 32.
 33.
 34.
 35.
 36.
 37.
 38.
 39.
 40.
 41.
 42.
 43.
 44.
 45.
 46.
 47.
 48.
 49.
 50.
 51.
 52.
 53.
 54.
 55.
 56.
 57.
 58.
 59.
 60.
 61.
 62.
 63.
 64.
 65.
 66.
 67.
 68.
 69.
 70.
 71.
 72.
 73.
 74.
 75.
 76.
 77.
 78.
 79.
 80.
 81.
 82.
 83.
 84.
 85.
 86.
 87.
 88.
 89.
 90.
 91.
 92.
 93.
 94.
 95.
 96.
 97.
 98.
 99.
 100.
 101.
 102.
 103.
 104.
 105.
 106.
 107.
 108.
 109.
 110.
 111.
 112.
 113.
 114.
 115.
 116.
 117.
 118.
 119.
 120.
 121.
 122.
 123.
 124.
 125.
 126.
 127.
 128.
 129.
 130.
 131.
 132.
 133.
 134.
 135.
 136.
 137.
 138.
 139.
 140.
 141.
 142.
 143.
 144.
 145.
 146.
 147.
 148.
 149.
 150.
 151.
 152.
 153.
 154.
 155.
 156.
 157.
 158.
 159.
 160.
 161.
 162.
 163.
 164.
 165.
 166.
 167.
 168.
 169.
 170.
 171.
 172.
 173.
 174.
 175.
 176.
 177.
 178.
 179.
 180.
 181.
 182.
 183.
 184.
 185.
 186.
 187.
 188.
 189.
 190.
 191.
 192.
 193.
 194.
 195.
 196.
 197.
 198.
 199.
 200.
 201.
 202.
 203.
 204.
 205.
 206.
 207.
 208.
 209.
 210.
 211.
 212.
 213.
 214.
 215.
 216.
 217.
 218.
 219.
 220.
 221.
 222.
 223.
 224.
 225.
 226.
 227.
 228.
 229.
 230.
 231.
 232.
 233.
 234.
 235.
 236.
 237.
 238.
 239.
 240.
 241.
 242.
 243.
 244.
 245.
 246.
 247.
 248.
 249.
 250.
 251.
 252.
 253.
 254.
 255.
 256.
 257.
 258.
 259.
 260.
 261.
 262.
 263.
 264.
 265.
 266.
 267.
 268.
 269.
 270.
 271.
 272.
 273.
 274.
 275.
 276.
 277.
 278.
 279.
 280.
 281.
 282.
 283.
 284.
 285.
 286.
 287.
 288.
 289.
 290.
 291.
 292.
 293.
 294.
 295.
 296.
 297.
 298.
 299.
 300.
 301.
 302.
 303.
 304.
 305.
 306.
 307.
 308.
 309.
 310.
 311.
 312.
 313.
 314.
 315.
 316.
 317.
 318.
 319.
 320.
 321.
 322.
 323.
 324.
 325.
 326.
 327.
 328.
 329.
 330.
 331.
 332.
 333.
 334.
 335.
 336.
 337.
 338.
 339.
 340.
 341.
 342.
 343.
 344.
 345.
 346.
 347.
 348.
 349.
 350.
 351.
 352.
 353.
 354.
 355.
 356.
 357.
 358.
 359.
 360.
 361.
 362.
 363.
 364.
 365.
 366.
 367.
 368.
 369.
 370.
 371.
 372.
 373.
 374.
 375.
 376.
 377.
 378.
 379.
 380.
 381.
 382.
 383.
 384.
 385.
 386.
 387.
 388.
 389.
 390.
 391.
 392.
 393.
 394.
 395.
 396.
 397.
 398.
 399.
 400.
 401.
 402.
 403.
 404.
 405.
 406.
 407.
 408.
 409.
 410.
 411.
 412.
 413.
 414.
 415.
 416.
 417.
 418.
 419.
 420.
 421.
 422.
 423.
 424.
 425.
 426.
 427.
 428.
 429.
 430.
 431.
 432.
 433.
 434.
 435.
 436.
 437.
 438.
 439.
 440.
 441.
 442.
 443.
 444.
 445.
 446.
 447.
 448.
 449.
 450.
 451.
 452.
 453.
 454.
 455.
 456.
 457.
 458.
 459.
 460.
 461.
 462.
 463.
 464.
 465.
 466.
 467.
 468.
 469.
 470.
 471.
 472.
 473.
 474.
 475.
 476.
 477.
 478.
 479.
 480.
 481.
 482.
 483.
 484.
 485.
 486.
 487.
 488.
 489.
 490.
 491.
 492.
 493.
 494.
 495.
 496.
 497.
 498.
 499.
 500.
 501.
 502.
 503.
 504.
 505.
 506.
 507.
 508.
 509.
 510.
 511.
 512.
 513.
 514.
 515.
 516.
 517.
 518.
 519.
 520.
 521.
 522.
 523.
 524.
 525.
 526.
 527.
 528.
 529.
 530.
 531.
 532.
 533.
 534.
 535.
 536.
 537.
 538.
 539.
 540.
 541.
 542.
 543.
 544.
 545.
 546.
 547.
 548.
 549.
 550.
 551.
 552.
 553.
 554.
 555.
 556.
 557.
 558.
 559.
 560.
 561.
 562.
 563.
 564.
 565.
 566.
 567.
 568.
 569.
 570.
 571.
 572.
 573.
 574.
 575.
 576.
 577.
 578.
 579.
 580.
 581.
 582.
 583.
 584.
 585.
 586.
 587.
 588.
 589.
 590.
 591.
 592.
 593.
 594.
 595.
 596.
 597.
 598.
 599.

1

• •

1. 1.

20

• • •

ad 5.10.11.

100

[illegible]

• •

*Journal of Management Education* 30(6)

Figure 1a



such lower multiplier as will limit the grand aggregate of common stock as closely as may be to the grand aggregate of preferred stock"

It is one of the rules in Wall Street that as far as possible a Company should be capitalized at very nearly the same amount of preferred as common stock. It is considerable of an advantage. It is found that the preferred stock-holders if they find that the company is going to be exceedingly prosperous and that common stock is the thing to hold, they will sell the preferred on the street and buy common, and then someone on the street who knows what is going on will get hold of the preferred stock and will run the whole thing. On the other hand if they find the company is not going to be so prosperous they will sell the common and take preferred, and somebody on the street will buy the common. The way to get out of that is to have two kinds of stock as nearly alike as possible.

In making up these new earnings also, for this purpose, the amount of the management expenses, salaries, etc., all should be stated separately, because that forms a very fair comparison later with what the new company will have to pay and it is easy to figure out what saving there will be in that direction. In the same way all these things are subject to a certain amount of adjustment.

Let us take the case of the promoter. He has his options generally. An option is an agreement stating that ABC will sell out to me at \$300,000. cash provided that the agreement is closed within a certain time. After you have these propositions in your hands, the promoter goes to a banking company and asks them to advance money, and it costs thousands of dollars. But if he can not get any money from the banking company he has to go and ask these people if they will not set apart a certain part of their earnings so as to give him a fund for the purpose.

The first thing he discovers is that these investigations of profits and appraisals completely knock out the statement of what each man is worth. Of course a merchant is not going to put close figures on a thing of that sort. Therefore it has come to be a story in Wall Street and an option is after all only the beginning of a series of negotiations

Now begins the troubles of the promoter. He must go to Mr. A and says, Mr. A you have got this down for \$300,000. What do you mean? You told me your real estate was worth \$100,000. and I find by the appraisal it is only worth 50,000. He says, It is worth that to me. That is not the way to talk. That man has innocently misled the promoter so that his schemes are all thrown out. Finally he get his down to a place where he says he

...to be investigated as to the possibility of obtaining a license to practice law in the State of Florida.

It is one of the rules of the Florida Bar that a person who is not a member of the Bar should not practice law in the State of Florida. This rule is designed to protect the public from the unqualified practice of law. The Florida Bar is a voluntary association of lawyers who have been admitted to the Bar by the Florida Supreme Court. The Bar is organized into sections, each of which represents a different branch of the law. The Bar is responsible for the regulation of the legal profession in the State of Florida. The Bar is also responsible for the promotion of the public interest in the administration of justice.

The Florida Bar is a voluntary association of lawyers who have been admitted to the Bar by the Florida Supreme Court. The Bar is organized into sections, each of which represents a different branch of the law. The Bar is responsible for the regulation of the legal profession in the State of Florida. The Bar is also responsible for the promotion of the public interest in the administration of justice.

Let us take the case of the person who is not a member of the Bar. He may be a person who is not a member of the Bar because he has not been admitted to the Bar by the Florida Supreme Court. He may be a person who is not a member of the Bar because he has not been admitted to the Bar by the Florida Supreme Court. He may be a person who is not a member of the Bar because he has not been admitted to the Bar by the Florida Supreme Court.

The first thing he should do is to apply for admission to the Bar. He should apply to the Florida Supreme Court for admission to the Bar. He should apply to the Florida Supreme Court for admission to the Bar. He should apply to the Florida Supreme Court for admission to the Bar.

Now before the Florida Supreme Court. He should appear before the Florida Supreme Court and make his application for admission to the Bar. He should appear before the Florida Supreme Court and make his application for admission to the Bar. He should appear before the Florida Supreme Court and make his application for admission to the Bar.

will accept a certain amount of preferred and common stock.

He goes to a man in the next state, who says, I do not know whether I want to go into this. My business is flourishing; why should I go into the combination. He meets with those cases where he must practically promise the Presidency of the company to that man before he will go in. Another man is a leader in trade. He has been before Congress, he is known as Colonel Smith; everybody knows him. You will find his business is not worth as much as a man in the next state living very quietly and attending to his business; but at the same time his position before the country is such that it must be regarded. You can not give that man a strict pro rata share on the basis of what his earnings are. These adjustments must take place before the combination can be formed.

Sometimes these people will not speak to each other. I have known cases where if a man found out his competitor was valued at \$50,000. more than he was he would break the whole combination. The promoter must face these questions.

A combination that is worth anything at all is capable of great development. The management salaries can be greatly reduced. And where the companies are competing with each other, of course each has a branch office in the same place, and those expenses can be reduced. Suppose we find that this theory calls for \$100,000. preferred stock and \$100,000. common stock. But a calculation is made and you find that with the additional earnings fairly estimated it will warrant a capitalization of \$200,000. Then onehalf of the increase is set aside to furnish working capital and the rest of it pays expenses and gives the promoter and banker their profit. That is, in a rough and ready way, the way these things are managed.

So they capitalize that company at \$100,000. preferred and \$100,000. common, and give to each individual his proportion; and then sell to the public.

These companies must have working capital. Experience shows that these great concerns have not had money enough. You have got to have a very considerable sum of money for material which you must purchase. You ought to have working capital enough to discount your bills. Another thing you want working capital for is to carry accounts for your customers. In trade thirty days is considered cash; but trades vary as to payment from thirty days to two years. There is no rule as to the amount of working capital; it must be figured out in each individual case, depending on the nature of the business.



A great deal of money in the treasury is almost as dangerous in a corporation as it is for the U.S. Government. Now if they do not do that they have got to borrow. Borrowing may be a very serious business. Heretofore the small merchant went to the local bank and got it. But when he goes into the combination the conditions are entirely changed, and it becomes a serious question as to just what credit he ought to have. So it is not easy always for corporations to borrow large sums of money.

There are certain trades where that question is a very serious one. In the Linseed Oil Co., for example, it is a very difficult problem to know whether they ought or ought not to buy very large quantities of flaxseed. It requires great judgment, and it is the easiest thing in the world to make a mistake in mercantile matters so that it means a loss of thousands of dollars to you if you get on the wrong side of the market. All these things show how important is the question of working capital.

One of the things the promoter has to do in the meantime is this: He has taken an option from the different concerns to pay them cash, but he knows that that is out of the question. He only does that to get a start. He can not pay them cash because nobody will buy for cash. So if the property is worth \$100,000. of preferred and common he has agreed with them that they shall take \$75,000. in stocks and he will give them cash for the difference. That cash he must pay and he must collect money for working capital, because every one of the firms is indebted to the bankers. So he goes to a banker and says, we will sell the preferred for par. They get up an underwriting syndicate in which all the various facts are stated, and the subscribers agree to underwrite it. The underwriting syndicate is usually paid 10%. The agreement is that the underwriting syndicate will take that stock if nobody else does, and they get 10% in any case. It is offered then for public subscription, and that secures the success of the company. It often happens, however that the underwriter is caught; that is to say, the public does not subscribe. The public after all is the main reliance. This Wall Street arrangement is only to keep the machinery going by which you and I in different places buy a few shares of stock. It is bad for the company to have a lot of stock in the hands of underwriters, because the moment they get a chance they will sell it.

--- oOo ---

March 20, 1901

[illegible][illegible][illegible]

## LECTURE IV.

-----oOo-----

There are one or two special subjects I wish to direct your attention to in this lecture.

In the first place, I might say to you that the rights of minority stock holders are becoming more and more protected by the courts in their decisions. The tendency of the courts is entirely toward the side of the minority stock holder and he is not slow to take advantage of it. In fact, in the opinion of some good corporation lawyers in New York City, the courts are going to an extreme in that matter. It is one of the great drawbacks to carrying on some of these consolidation schemes. In the case of the Monon Railway they had a reorganization about three years ago, and for purposes of their own some people undertook to upset it. They proved that the bond holders and stockholders had agreed and the courts threw it out on the ground it would look very much like a conspiracy among the creditors. That is pretty far fetched, but it shows the disposition of the courts to protect minority stock holders. Where a company gets control of another company by possession of a majority of its stock, and then it proceeds for purposes of its own to use that other company in a way which will greatly benefit company number one, the minority stock-holder will say his rights are being infringed and will apply to the courts for a receiver. I have known several cases like that.

Another thing in regard to profits, which has happened several times in my experience. Where there is a tax on the profits of corporations, a company that is owned by two or three people, when they get toward the end of their fiscal year, they will size up pretty closely what their profits are going to be, and they will pay this as salaries to themselves; and then they report to the tax collector they have made no profits, which is technically correct.

Now the other extreme of that is the partnership where they pay no salaries, where in making a calculation of their profits you are obliged to charge against those profits the salaries of the partners.

One word also on industrial bonds. Of course as you can very well understand industrial bonds do not stand in the eyes of Wall Street as high as Railway bonds, and it is hardly to be expected. But those who have them to sell try to get around that by putting unusual provisions in those bonds. For example,





in addition to being a mortgage on the plant, they say in one case that they agree to keep a certain amount of assets on hand as a further protection. Another very famous way of getting around the industrial bond question is to agree for example that the bonds shall only run for ten years and shall be paid for at a certain rate per year.

There is also a question of the interest of the employees in large corporations. So far as I am able to judge, they are rather in favor, than the contrary, of the large corporations. They can deal with a large corporation in a better way when they have trade unions, and their status is much better fixed. They have in the large corporations a chance of steady work which they do not have in a small one, because in the large corporations they are not so liable to shut down. We hear of large corporations occasionally discharging men, but the same thing existed in the case of the small trader, though we never heard of it. There is another point in connection with this. The Department stores in New York are ready to pay very fair salaries to persons who can go in their in charge of departments. A small storekeeper who has made a success perhaps may go in their as head of a department or assistant, or something of that sort, and if they have ability they are willing to pay them for it.

Another difficulty in making these combinations very frequently is to keep persons who have been managers and owners of these subsidiary companies out of that business hereafter. Of course these agreements are usually made to say that the person who owned these plants before shall not go into the business again, but often it is not protection because a man who is determined to be dishonorable can always find a way of starting up competition. Now one scheme of getting around that is to have a sort of advisory board, not the board of directors, but who are to advise the board of directors what to do and the board of directors may or may not take their advice. They give a salary varying from \$1000. to \$2000. for being on this advisory board, and by that means they keep, their interest in the corporation, and add their interest to their pledged word that they will not go into the same business.

It very often happens when these assets are taken over that the combining company will ask, instead of paying over to the subsidiary company all of the preferred stock which under this plan would be payable to them, to have them deposit their preferred stock with a trust company until such time as it is proved whether they can collect the customers accounts.

[illegible]

I have not yet explained to you the machinery by which the new company is actually put together. That process is something like this. The incorporators of the new company get up a board of directors, who are usually clerks in law offices, and they take out a charter in the state of New Jersey. That charter provides that the company can begin business when a certain number of shares of stock are subscribed and actually paid for. Therefore this dummy board of directors goes to work and subscribes that requisite amount of capital stock and pay it in to the treasurer of the company. The lawyers furnish the money, and they in turn put it into their expenses. Now when the capital stock is subscribed and paid for the company is ready to do business. Then they call a meeting of the board of directors, and before that board of directors is ~~a~~ put a proposition on behalf of John Jones in which he says, I offer to your Honorable Board the following proposition, and that is, if you will issue to me \$500,000. worth of preferred stock and \$500,000. common of the A.B.C. company, I on my part will agree to turn over to you such and such other companies. Now the board of directors accept the proposition. They appoint a trust company to handle the business, and as fast as the companies are turned in by John Jones his stock is turned back to those people. The result of that is that when the new company is formed, no one can find out what was actually paid for those companies. It is not on the record individually. It is all pre-arranged, and this is only the machinery by which it is gotten into the hands of the new company.

We will turn now for a moment to a theoretical case of possible economies under a combination. Of course these combinations some of them have greatly over-estimated the amount of savings that they are going to make; but there are certain cases where a combination does effect a very great saving, or would if it were possible to put it in force. And I am proposing this evening to bring one of these theoretical cases before you, although I tell you beforehand that it is not very likely to happen.

The anthracite coal field of Pennsylvania are in the eastern part of that state and they cover something like three hundred square miles. It is the only field of any consequence in the U.S. for hard coal. Now running into this field are something like seven railroad companies, and they all compete with each other in carrying this coal. They have formed a sort of agreement among themselves as to the percentage of the total output which each road is likely to carry and will carry.



There is no contract or agreement in writing, but each one is bound on honor to keep that proportion as nearly as possible. These railroads are either affiliated with or in some cases own the coal companies. The railroads themselves except in a few cases are forbidden by the laws of Pennsylvania to own land, but most of these companies own the stock of the coal company which in turn owns the coal beds.

There is also another element, the element of the individual operator. The railroad companies or those coal companies affiliated with the railroad companies do not own all the coal. There used to be until quite recently quite a number of what they call individual companies, that is to say, those that were not affiliated with any railroad company, and they were always fighting for better terms, complaining that they were being crushed out. They are selling out now slowly to the railroad companies. The individual operator has rights at law which the railroad companies pay some attention to, but commercially they get around it, by not giving them cars or something of that kind.

One result of these different railroads running in there is of course that each railroad is capitalized for all it is worth, and it must earn interest on that capitalization. As a general rule the earnings come principally from the carriage of coal. It will therefore be apparent to you that a company like that must have a certain number of collieries which will supply coal and it must keep those collieries running, because it is from the product of those collieries that they get their tonnage and it is on that tonnage that they depend for their bond interest.

The collieries on these individual roads vary greatly from each other. Some of them are very expensive to operate, but whether easy or difficult that road must work those collieries. The cost of mining anthracite coal is perhaps \$1.00 or \$1.25 a ton. Now if it were possible to supply the consumer by shutting up the bad collieries and working the cheap ones, at least until the cheap ones were exhausted, there is no doubt but that a very considerable amount of money could be saved on every ton. But under the present circumstances that saving is out of the question.

Then again, when one of the roads that operates a colliery finds that it is running away ahead of its percentage, they have to shut down or work on half time until they think they have caught up with their percentage. There again is a very great waste; it is expensive and it is hard on the operatives.



Moreover, a great and needless expense arises from the hauls over the mountains. The Central railroad of New Jersey stops where the City of Wilkesbarre is in the Susquehanna Valley. It has no western connection and therefore the coal that it mines from its collieries must go up over that mountain and then hauled to tide water. On the other hand, the Lehigh Valley Railroad is on the other side of the mountain, and hauls a great part of its coal over the mountain to the western states. So that those two coal trains with loaded cars of coal are passing each other going over this mountain all the time; a perfect waste.

Then there is another thing. Every company has its selling agents. These coal agents and the system of distribution are very expensive. One selling agent could sell the whole amount of coal much cheaper.

Again, I suppose you know that when a large combination is formed, one of the principal things that combination tries to do is to make a study of the industrial field so far as its own business is concerned. Nothing of that kind is done in this anthracite business because we have no statistics. Nobody knows how many tons are sold every year in Buffalo, for example. Each company knows how much each one is selling, but what the total is nobody knows, and nobody knows whether it is in proportion to population. There is no systematic study of the situation.

The result of all that is that if these companies could be put together in a combination, that is, if the coal companies and the railway companies could all be put together, a great saving would be effected. I have stated on another occasion that it is my individual opinion that coal could be reduced in cost to the consumer from 50 cts. to \$1.00 a ton if that combination could take place. The rate of wages of the operatives could be raised 25 cts. a ton.

But the state of Pennsylvania is very hostile to anything of that sort, and there is a provision in the laws of that state that nothing of this kind shall take place. If I were adviser to the State of Pennsylvania, I should say to them that if it is your wish to do something practical toward reducing the price of coal to your consumers you had better force these companies together rather than force them apart, because that is the only way you will get a reduction.

Now the question comes, suppose this combination could be made, would it reduce the price of coal. What is to hinder the people from putting the price up instead of down? There is

1. The first of these is the fact that the  
2. Government has been unable to obtain the necessary  
3. funds to carry out its policy of maintaining the  
4. peace in the Middle East. This is due to the fact  
5. that the United States has been unable to obtain the  
6. necessary funds from the Congress. This is due to the  
7. fact that the Congress has been unable to pass the  
8. necessary legislation. This is due to the fact that  
9. the Congress has been unable to reach a consensus  
10. on the issue. This is due to the fact that the  
11. Congress has been unable to reach a consensus on the  
12. issue. This is due to the fact that the Congress  
13. has been unable to reach a consensus on the issue.  
14. This is due to the fact that the Congress has  
15. been unable to reach a consensus on the issue.

1. The first part of the document is a letter from the President of the United States to the President of the Republic of China, dated January 1, 1955. The letter is signed by Dwight D. Eisenhower and is addressed to Chiang Kai-shek. The letter discusses the relationship between the United States and the Republic of China, and the importance of the Republic of China in the Pacific region.

[illegible]

1. The first of these is the fact that the  
2. second of these is the fact that the  
3. third of these is the fact that the  
4. fourth of these is the fact that the  
5. fifth of these is the fact that the  
6. sixth of these is the fact that the  
7. seventh of these is the fact that the  
8. eighth of these is the fact that the  
9. ninth of these is the fact that the  
10. tenth of these is the fact that the

...the ...  
...of ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...  
...the ...

1. The first group of people who are not in the  
2. second group are the people who are not in the  
3. third group are the people who are not in the  
4. fourth group are the people who are not in the  
5. fifth group are the people who are not in the



a great deal to hinder them. The price of anthracite coal is now as high as it is possible, economically speaking, to put it. They have already lost a great deal through gas and oil competition. Then bituminous coal of the very best quality can be burned if the necessity should arise. You can rest assured that no matter what may happen anthracite coal will never be substantially higher than it is now. There is also the possibility of electric competition.

Furthermore it seems to me that such a combination as that would only prepare for the contingency of some such competition as electricity. I think that sometime we will have electric competition of a severe kind with anthracite.

Then I believe that the financial people if they could go into that combination would be willing to reduce the price of coal one dollar if they could make a larger profit than at present. They recognize the force of public opinion, and they would be the first to recognize that they ought to share their profits with the public.

There is a striking case of the benefits which could come if they could only combine. I do not think that the force of the illustration is lost by the fact that we are not likely to see it, although it may be that Mr. Morgan will do something toward putting it all under one selling agency, as soon as he has time to turn from the U.S. Steel Corporation and his other large interests.

Now of course every combination can not reduce prices as much as that to the consumer, but there is always a possibility, and I look for the final outcome of that reduction in price, not possibly through the good will of the people, for they are business men, but through the force of circumstances, and through this community of interests of the railroads.

-----oOo-----

March 21, 1901

...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...  
...the ... of ...

## LECTURE V.

---000---

I have been asked to say a word about some of the actual methods of transacting business in Wall Street. There are certain terms in use which you will not understand unless you are speculating or have studied the subject.

We will take for example a small sum of money. Suppose that there is a stock whose par value is 100 and selling in the street for \$100. You understand that all stock is based on 100, and if they say for example that a stock is selling for 150, they mean 150%. Now nearly all shares are \$100., but occasionally you will find them at \$50. each, but whatever the amount of the stock is, when they say 150 they mean 150%, which in the case of a \$50. share would mean \$75.

Now taking a stock at 100, selling at par \$100., we suppose you have got a tip from somebody that that stock is going up. The procedure is this: You go to a stock broker and tell him to buy one share of this ABC stock which is selling for \$100. and you put down a \$10. bill. That is your margin. The broker goes out in the street and buys that stock, takes it around to a banker and borrows \$90. on it, or as near \$90. as he can get. As a general thing the broker wants the amount of margin from you that the bank wants from him. That borrowing then is straight out and out borrowing from the bank of \$90. on which the bank charges the broker interest, usually about 4%. Nevertheless by long custom the broker has a right to charge you 6%.

The transaction you see is just this: You have put down \$10. and you are the owner of that stock. You are entitled to any dividends paid on it, but you have not got it and can not get it unless you pay for it. At the same time the brokers charge on all sales for commission  $1/8$  of one per cent, plus some little incidental expenses, such as U.S. Government tax and something of that sort. So that your expense is the commission of the broker, the interest on the \$90. of 6%, and the incidental expense. Then if you sell, as you would have to do, you have just the same thing over again.

You will notice what is called taking a flyer in the street is usually one hundred shares and the brokers commission on that is just \$25.00 both buying and selling.

The more conservative brokers in New York ask 20 points margin. The reason of that is that these stocks are continually

1. The first thing I want to mention is that the stock market is a very volatile market. It can move up or down very quickly, and it can be very unpredictable. This is why it is important to have a good understanding of the market and to have a good investment strategy.

2. The second thing I want to mention is that the stock market is a very competitive market. There are many investors out there, and they are all trying to make a profit. This means that you need to be very smart and very quick if you want to succeed in the stock market.

3. The third thing I want to mention is that the stock market is a very risky market. There is a lot of uncertainty in the market, and there is a lot of risk involved in investing. This means that you need to be very careful and very cautious if you want to invest in the stock market.

4. The fourth thing I want to mention is that the stock market is a very long-term market. It takes a long time to build up a portfolio, and it takes a long time to see the results of your investments. This means that you need to be patient and you need to have a long-term perspective if you want to succeed in the stock market.

5. The fifth thing I want to mention is that the stock market is a very emotional market. There is a lot of excitement and a lot of fear in the market, and this can lead to irrational decisions. This means that you need to be very disciplined and very rational if you want to succeed in the stock market.

6. The sixth thing I want to mention is that the stock market is a very complex market. There are many different factors that can affect the stock market, and it can be very difficult to understand. This means that you need to be very knowledgeable and very experienced if you want to succeed in the stock market.

going up more or less without much reference to their intrinsic value. The broker wants to avoid any trouble about having the margin affected by small fluctuations, so he usually asks 20 points, and you would have to put down \$20. and he would borrow \$80. on that stock. There are other brokers who are willing to accept \$10. on one stock, particularly if they know who you are and that they can rely on you. There are also certain brokers that will sometimes take a small amount of money from a clerk or somebody else on a 5 point margin, but they are the exception.

Now let us suppose that for some reason you have put down \$10. and this is your margin. A margin is nothing but a mortgage that you have given for the 90% of that money. Let us suppose that for some reason you are sure this stock is going up; but unforeseen things have happened, as the news of a war, and down the thing goes 5 points. The result is the broker's margin is affected; the bank's margin is affected; and the broker notifies you to pay \$5. more. You go around there and pay \$5. more to keep up always 5 points. If you do not respond to his notice he sells you out; that is, he sells the stock for 95, and after taking out his commissions, hands you the difference.

If on the other hand that stock should go up to 105, and you go around there and say you will take that, he sells at that and hands you \$15. less expenses. You make the difference between what you put up and what you get.

In cases where a small 5 point margin is accepted, they usually ask for what they call on the street a stock order. That is to save the broker from possible loss. It is an order allowing him to sell that stock if it should decline 3 points. The point of that is just this: This is a legal and binding contract between the broker and yourself, so that if the stock should fall all of a sudden to 15 points, the broker would have the right to sue you for the difference of 5 points. You are responsible, but the person who is willing to gamble on a 5 point margin while theoretically he is responsible for it practically he has no money or else he would not do it.. If that stock begins to drop the moment it gets to 97 that broker telephones over to the exchange to sell that stock, and he takes his chances on his being able to telephone over to the stock exchange and get that stock sold before it goes down to 95. In other words, he has two points safety there which he can take advantage of and if he does not do it he loses, because the person who takes a 5 point gamble has no reserve and he would be certain to lose. That is not considered very good business.

Figure 1. The effect of the number of trials on the number of correct responses. The number of correct responses was significantly higher for the 10 trials condition than for the 5 trials condition. Error bars represent the standard error of the mean.

The first of these is the fact that the  
 second of these is the fact that the  
 third of these is the fact that the  
 fourth of these is the fact that the  
 fifth of these is the fact that the  
 sixth of these is the fact that the  
 seventh of these is the fact that the  
 eighth of these is the fact that the  
 ninth of these is the fact that the  
 tenth of these is the fact that the

1. The first thing I noticed when I stepped out of the plane was the cold, crisp air. It felt like a blanket after a long, hot journey. The ground below was a mix of green fields and small villages, with a few roads winding through them. The sky was a pale blue, with a few wispy clouds scattered across it. I took a deep breath and felt a sense of peace wash over me. It was a good feeling, and I knew that I was in for a great trip.

[illegible]

A tip is a dangerous thing. The man that has a sure thing in Wall Street is a man to look out for. In Wall Street the main thing is to keep your mind in the condition that they say the banks assets should be in, liquid; because there is no place in the whole universe where you are obliged to change your mind so quickly as you are in Wall Street if the conditions demand. The stubborn man has no business there.

The rule in Wall Street is let your profits run on and stop your losses. If there is a declaration of war and stocks begin to go down sell as fast as possible. If everything is going up let your profits run until you think it is high enough and then sell. Brokers will perhaps tell you that you ought to wait until the top of the market is reached, but that is not good practice.

Let us suppose that you are on the inside of Mr. Morgan's company and you understand that something is going on about C. & St. P or Burlington, and so you take a 20 point margin on some Burlington stock. You are never sure of anything in Wall Street. The first thing that may happen is that it may go down two or three points. One thing is the amount of loanable capital that there may be in New York at the time. Just the moment that loanable capital begins to be all taken up, so that bankers begin to say I think I ought to have 8% for my money, there is a great effect on prices. Usually however the people who negotiate these great deals look over the money market very carefully, and if there is any chance of tight money they will not go into it.

Of all the places in the world to make a man break down his health, it is Wall Street. If you have a large amount of money depending on whether stock goes up or down, it is a severe nervous test. The Wall Street people get gray by the time they are 40 years old.

In regard to selling short. It is only about one person out of a hundred that is capable, has the nerve and mind to make money on disasters. That is what it means to sell short. Ninety-nine men out of a hundred are optimists naturally. We would far rather make money on a rising market than on a falling market. Selling short means selling what you have not got. You go to a broker and say I think Burlington is going down; therefore sell one share Burlington. You put up the same margin as before. The broker goes out on the street and borrows a share of Burlington stock for which he pays a certain sum, a small percentage. That is a regular business. People who are holding shares for a rise are perfectly willing to make a few dollars by lending that stock during the time they do not want it. The broker borrows





that share and delivers it to the man to whom he sold it. Now you sit down and wait for that stock to go down. If that stock goes down to 90 you cover, as the expression is; that is, to say, you go out and buy it at 90 and hand it back to the man you borrowed it from. That, as you see, completes the transaction, and you have made \$10.

The danger of that thing is that just the moment that that stock begins to go up you have got to cover at whatever the price may be. On the other hand, strange to say, some of the best fortunes in Wall Street have been one on selling short; because it takes nerve, it takes mind, it takes careful study of the situation to sell short, because it is contrary to human nature. But if you really know what is going to happen, more fortunes are made that way than in any other way. If you simply gamble without inside knowledge in Wall Street you are certain to lose your money in the long run. You are simply betting against a set of circumstances you know nothing about, and which involve not only the condition of the Burlington Railroad but the condition of things in China, and you can not tell what minute a good piece of news will come over the wire or a bad one. Even Mr. Morgan himself got sold most beautifully. He had commitments in Wall Street for the reorganization of the Reading Company to a very large amount and the next day President Cleveland came out with the Venezuela proclamation, and the thing went right to pieces. If it had been anybody else it would have ruined him, but he simply hung on and in due time it came out all right.

One thing more in regard to the financing. The word financing as it is understood in Wall Street means the furnishing of the money. From the time an enterprise is decided upon until the bonds or shares get into the hands of the public there is a period when they must have the money and they have not sold their bonds. The person who supplies that money to them is the banker, who is said to finance the undertaking, not permanently to keep the bonds and stocks. The usual way is to go to a trust company, because a trust company can do what a bank can not do, that is, lend money on undertakings which are likely to run for several months or even for a longer time. They can do it safely when a bank can not do it owing to the condition of their deposits.

The individual owner of a factory is not going to turn over the factory until he gets money. So he goes to a trust company and deposits the title deeds, and they give him a certificate and so much money. In other words, the trust company practically lend that money to the new company which is about to be formed, and take as collateral the whole papers in the case.



That is not the best kind of lending, according to the bankers definition, but it is the kind of lending that they get more profits out of, because a trust company that is willing to finance a concern on condition that these papers are put in its hands gets 6% and commissions. But the risk is great; and that is one reason why the position of President of a Trust Company and President of a Bank are quite different.

Now in regard to money, perhaps it would be well to call your attention to the fact that New York City is the great place where all the capital of the U.S. finally goes than can not be used anywhere else.

I might give you an illustration which you may work out. If you will take the report of the Controller of the currency, and find the total value of the deposits of the national banks all over the U.S., the state banks, the trust companies, the private bankers, and make a table showing the total amount of money deposited in the U.S.; then make another table of the amount of money that each one of these groups of banking institutions hold in actual cash; then take the statement of the Treasurer of the U.S. as to how much money there is in circulation, curious results will follow. When I looked at it three years ago the estimated amount of money in the U.S. was \$1,500,000,000. Now the amount these particular institutions held was \$500,000,000 which leaves a difference of \$1,000,000,000, which if it had any existence at all was in the pockets of the people; it certainly was not in any institution. Now the deposits footed up \$4,500,000,000. In other words the deposits of the banking institutions of this country are three times the total amount of money in circulation, and they are nine times the amount of money in the hands of these banks. Now I ask you what was it that constituted those deposits. Certainly it was not money. It was banking credits. It shows conclusively the large amount of banking credit that is done on a very small amount of actual circulating medium. The banks are dealers in credits. What they lend and what they finance these companies with are credits, based of course on the actual standard of value.

I have been asked to say a word about what forms a proper combination. That is a very difficult question, but we might talk about it a minute or two. A combination is not necessarily successful simply because two concerns have got together. There must be elements in common so that the business interests of those concerns would be furthered by a consolidation. For example, we will take the case of the N.Y. Central Railroad,

[illegible][illegible]

which was put together by Commodore Vanderbilt. It does not need any argument to show that that was a consolidation in the interest of all concerned. By the consolidation of the Burlington, for example, with the New York and New Haven, although they could be put together financially, would be of no benefit because they do not connect with each other. Now in the same way of course firms in New York and Chicago could be put together but the consolidation would have no effect at all, unless there are elements in it which can be taken advantage of. Such a concern as the American Car and Foundry Company is an instance of a good consolidation. All of those concerns were competing with each other, and they each of them had a very large amount of material on hand. Now they do not buy any material unless they have an order for cars. Then they can have that order executed at any of their various plants. The home office is notified of each shipment and the bills are sent to the customers from there and paid to the home office.

Now, gentlemen, let me say one word before I close. I have failed to put this subject before you in a proper light if I have not succeeded in making you believe that the individual man in business counts for more even, certainly as much as, he ever did before. Character is still the main thing, and the man who makes truth his aim is much more likely to succeed in business, leaving every other consideration out of view, than the man who does not. The object of all business is to ascertain truth.

—OOO—

March 22, 1901



## L E C T U R E    I .

---oOo---

During the past year we have given our attention to pure contracts. It is necessary in order to complete the course that we should pay some attention to what is known in the law of late years as quasi-contracts. This is a term that I do not like because it does not mean anything. "Quasi" is simply an apology for not saying anything. But the term is one that of late years has been grafted into the law and must be accepted as an admitted factor in the terminology. Keener and writers upon the science of jurisprudence have used the term and fastened it upon the law.

Bishop does not use the term in his work on contracts. What the others call quasi-contracts he calls contract created by law. See Bishop on Contracts, Sec. 181

There is only one text-book on the subject of Quasi-contracts, and that is too extensive for use in this school. The important principles are not very many, and I shall give you in a few lectures those that are most important.

Upon the subject of the definition of the term quasi-contract, see also 20 Pa St. 465

In that case the writer of the opinion divides contracts into three kinds: (a) express contracts; (b) implied contracts; (c) constructive contracts. This latter term I like much better than "quasi-contracts". He says "constructive contracts are fictions of law adopted to enforce legal rights by actions of contract where no real contract exists, express or implied."

Quasi-contract includes obligations imposed by law. There must be an absence of agreement. The obligation is one which is imposed by law and enforceable by action ex-contractu. You remember that in the study of pure contracts, we learned that a contract is a resultant of two ideas; one is agreement and the other is an obligation. Where there is an agreement that does not result in an obligation it is not a contract, but a quasi-contract.

1. We must distinguish between the obligation imposed and the legal fiction of a promise.

Keener says that a quasi-contract is nothing more than a legal fiction. I can not quite assent to it.

That there is a legal fiction in connection with the enforcement of the obligation is true; because there is an oblige-





imposed by law and when you enforce it by action ex-contractu, you aver in the declaration a promise, and that averment of a promise is false. To that extent a legal fiction is resorted to. But the obligation is a part of substantive and not adjective law. We must keep distinct the obligation and the fiction which is resorted to to enforce it.

2. There must be an utter absence of agreement.

Keener makes a mistake it seems to me in classifying a contract of suretyship as an illustration of quasi-contract. That seems to me more like a case of pure contract. If A signs B's note as surety and has to pay it, he can turn around and sue B and recover by way of contribution what he paid. Keener says that is a quasi-contract. It seems to me that when A signs B's note as surety he signs it knowing the law and understanding that A has promised impliedly to pay it, and the implication is from the very act of the signer. An implied promise is a case of pure contract, and not a quasi-contract.

Keener also takes the position that the obligation which attaches to an innkeeper at common law is a quasi-contractual obligation. But it seems to me that the liability of the innkeeper as insurer of the baggage is implied from the very fact that the man goes there and leaves his baggage implied in fact and not imposed by law.

The same is true of a common carriers obligation. It seems to me that his obligation to ship the goods safely is closer to an implied contract than quasi-contract.

You will remember that Anson gives us the various sources of obligation: agreement, delict, contract, judgment and quasi-contract. He does not consider the last one which we now propose to consider.

There are four sources of quasi-contractual obligation:

1. Obligation of record.
2. Those imposed by statutory law.
3. Obligations arising from individual and domestic status.
4. Obligations dictated by reason and justice.

We will take these up in their order.

#### 1. Obligations of Record.

The obligations of record which Anson gives are judgment and recognizance. One of these, a recognizance, is



a puro contract. The judgment of a court of record is not a contract at all. It is classed as a contract in Anson and other law writers, yet when pushed to it they all agree that a judgment is not a contract, because it does not result from an agreement.

1. Where the term "contract", express or implied, is used in a statute, a judgment is not intended or included.

146 U.S. 162

95 N.Y. 428

50 N.Y. 180

(Contrary) 32 Vt. 217.

This latter case is not so much to the contrary as first seems. In that state there was a statute which provided for trustee process, which is the same as garnishment; and the statute was in these words: "All actions founded on contract express or implied may be commenced by a trustee process"; and the question was whether the judgment was included. It was held that suit on a judgment might be maintained under that statute, because the word "founded" referred to the remedy rather than to the contract itself. The case, however, is not quite in harmony with the weight of authority.

2. A judgment is not a contract within the meaning of the constitution prohibiting the violation of the obligation of contracts. A change in the obligation of a judgment is not a change in the obligation of contract.

146 U.S. 162

#### Obligations Imposed by Statutory Law.

As an illustration the following actions are quasi-contractual. (a) The action of debt to recover penalties for violations of statutes.

(b) The action of money had and received to recover money lost and gained.

(c) The action by one municipality to recover of another for the support of a pauper; that is to say, a duty having been imposed upon one municipality, if another performs that duty, it can sue in assumpsit or quasi-contract, and recover for the support of that pauper.

10 B. Monroe 438

2. A statutory duty imposed on one party but performed by another will support assumpsit.

5 Mass. 523

45 Mich. 442

But see 50 Me. 86

[illegible]

None of the letters to anyone, "private" or official.

If you are interested in a particular collection of

[illegible][illegible][illegible]

recovered at 100 percent. The following table shows the results of the tests.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines. The Commission is therefore unable to determine whether the activities of the AFSC in the Philippines are consistent with the principles of the AFSC's charter.

1. The first part of the document is a letter from the
 2. author to the reader, explaining the purpose of the
 3. study and the methods used. The letter is dated
 4. 1964 and is addressed to the reader.
 5. The second part of the document is a list of
 6. references, which includes the following:
 7. 1. The first reference is a book by the author,
 8. 2. The second reference is a book by the author,
 9. 3. The third reference is a book by the author,
 10. 4. The fourth reference is a book by the author,
 11. 5. The fifth reference is a book by the author,
 12. 6. The sixth reference is a book by the author,
 13. 7. The seventh reference is a book by the author,
 14. 8. The eighth reference is a book by the author,
 15. 9. The ninth reference is a book by the author,
 16. 10. The tenth reference is a book by the author,
 17. 11. The eleventh reference is a book by the author,
 18. 12. The twelfth reference is a book by the author,
 19. 13. The thirteenth reference is a book by the author,
 20. 14. The fourteenth reference is a book by the author,
 21. 15. The fifteenth reference is a book by the author,
 22. 16. The sixteenth reference is a book by the author,
 23. 17. The seventeenth reference is a book by the author,
 24. 18. The eighteenth reference is a book by the author,
 25. 19. The nineteenth reference is a book by the author,
 26. 20. The twentieth reference is a book by the author,
 27. 21. The twenty-first reference is a book by the author,
 28. 22. The twenty-second reference is a book by the author,
 29. 23. The twenty-third reference is a book by the author,
 30. 24. The twenty-fourth reference is a book by the author,
 31. 25. The twenty-fifth reference is a book by the author,
 32. 26. The twenty-sixth reference is a book by the author,
 33. 27. The twenty-seventh reference is a book by the author,
 34. 28. The twenty-eighth reference is a book by the author,
 35. 29. The twenty-ninth reference is a book by the author,
 36. 30. The thirtieth reference is a book by the author,
 37. 31. The thirty-first reference is a book by the author,
 38. 32. The thirty-second reference is a book by the author,
 39. 33. The thirty-third reference is a book by the author,
 40. 34. The thirty-fourth reference is a book by the author,
 41. 35. The thirty-fifth reference is a book by the author,
 42. 36. The thirty-sixth reference is a book by the author,
 43. 37. The thirty-seventh reference is a book by the author,
 44. 38. The thirty-eighth reference is a book by the author,
 45. 39. The thirty-ninth reference is a book by the author,
 46. 40. The fortieth reference is a book by the author,
 47. 41. The forty-first reference is a book by the author,
 48. 42. The forty-second reference is a book by the author,
 49. 43. The forty-third reference is a book by the author,
 50. 44. The forty-fourth reference is a book by the author,
 51. 45. The forty-fifth reference is a book by the author,
 52. 46. The forty-sixth reference is a book by the author,
 53. 47. The forty-seventh reference is a book by the author,
 54. 48. The forty-eighth reference is a book by the author,
 55. 49. The forty-ninth reference is a book by the author,
 56. 50. The fiftieth reference is a book by the author,
 57. 51. The fifty-first reference is a book by the author,
 58. 52. The fifty-second reference is a book by the author,
 59. 53. The fifty-third reference is a book by the author,
 60. 54. The fifty-fourth reference is a book by the author,
 61. 55. The fifty-fifth reference is a book by the author,
 62. 56. The fifty-sixth reference is a book by the author,
 63. 57. The fifty-seventh reference is a book by the author,
 64. 58. The fifty-eighth reference is a book by the author,
 65. 59. The fifty-ninth reference is a book by the author,
 66. 60. The sixtieth reference is a book by the author,
 67. 61. The sixty-first reference is a book by the author,
 68. 62. The sixty-second reference is a book by the author,
 69. 63. The sixty-third reference is a book by the author,
 70. 64. The sixty-fourth reference is a book by the author,
 71. 65. The sixty-fifth reference is a book by the author,
 72. 66. The sixty-sixth reference is a book by the author,
 73. 67. The sixty-seventh reference is a book by the author,
 74. 68. The sixty-eighth reference is a book by the author,
 75. 69. The sixty-ninth reference is a book by the author,
 76. 70. The seventieth reference is a book by the author,
 77. 71. The seventy-first reference is a book by the author,
 78. 72. The seventy-second reference is a book by the author,
 79. 73. The seventy-third reference is a book by the author,
 80. 74. The seventy-fourth reference is a book by the author,
 81. 75. The seventy-fifth reference is a book by the author,
 82. 76. The seventy-sixth reference is a book by the author,
 83. 77. The seventy-seventh reference is a book by the author,
 84. 78. The seventy-eighth reference is a book by the author,
 85. 79. The seventy-ninth reference is a book by the author,
 86. 80. The eightieth reference is a book by the author,
 87. 81. The eighty-first reference is a book by the author,
 88. 82. The eighty-second reference is a book by the author,
 89. 83. The eighty-third reference is a book by the author,
 90. 84. The eighty-fourth reference is a book by the author,
 91. 85. The eighty-fifth reference is a book by the author,
 92. 86. The eighty-sixth reference is a book by the author,
 93. 87. The eighty-seventh reference is a book by the author,
 94. 88. The eighty-eighth reference is a book by the author,
 95. 89. The eighty-ninth reference is a book by the author,
 96. 90. The ninetieth reference is a book by the author,
 97. 91. The ninety-first reference is a book by the author,
 98. 92. The ninety-second reference is a book by the author,
 99. 93. The ninety-third reference is a book by the author,
 100. 94. The ninety-fourth reference is a book by the author,
 101. 95. The ninety-fifth reference is a book by the author,
 102. 96. The ninety-sixth reference is a book by the author,
 103. 97. The ninety-seventh reference is a book by the author,
 104. 98. The ninety-eighth reference is a book by the author,
 105. 99. The ninety-ninth reference is a book by the author,
 106. 100. The hundredth reference is a book by the author,
 107. 101. The hundred-first reference is a book by the author,
 108. 102. The hundred-second reference is a book by the author,
 109. 103. The hundred-third reference is a book by the author,
 110. 104. The hundred-fourth reference is a book by the author,
 111. 105. The hundred-fifth reference is a book by the author,
 112. 106. The hundred-sixth reference is a book by the author,
 113. 107. The hundred-seventh reference is a book by the author,
 114. 108. The hundred-eighth reference is a book by the author,
 115. 109. The hundred-ninth reference is a book by the author,
 116. 110. The hundred-tenth reference is a book by the author,
 117. 111. The hundred-eleventh reference is a book by the author,
 118. 112. The hundred-twelfth reference is a book by the author,
 119. 113. The hundred-thirteenth reference is a book by the author,
 120. 114. The hundred-fourteenth reference is a book by the author,
 121. 115. The hundred-fifteenth reference is a book by the author,
 122. 116. The hundred-sixteenth reference is a book by the author,
 123. 117. The hundred-seventeenth reference is a book by the author,
 124. 118. The hundred-eighteenth reference is a book by the author,
 125. 119. The hundred-nineteenth reference is a book by the author,
 126. 120. The hundred-twentieth reference is a book by the author,
 127. 121. The hundred-twenty-first reference is a book by the author,
 128. 122. The hundred-twenty-second reference is a book by the author,
 129. 123. The hundred-twenty-third reference is a book by the author,
 130. 124. The hundred-twenty-fourth reference is a book by the author,
 131. 125. The hundred-twenty-fifth reference is a book by the author,
 132. 126. The hundred-twenty-sixth reference is a book by the author,
 133. 127. The hundred-twenty-seventh reference is a book by the author,
 134. 128. The hundred-twenty-eighth reference is a book by the author,
 135. 129. The hundred-twenty-ninth reference is a book by the author,
 136. 130. The hundred-thirtieth reference is a book by the author,
 137. 131. The hundred-thirty-first reference is a book by the author,
 138. 132. The hundred-thirty-second reference is a book by the author,
 139. 133. The hundred-thirty-third reference is a book by the author,
 140. 134. The hundred-thirty-fourth reference is a book by the author,
 141. 135. The hundred-thirty-fifth reference is a book by the author,
 142. 136. The hundred-thirty-sixth reference is a book by the author,
 143. 137. The hundred-thirty-seventh reference is a book by the author,
 144. 138. The hundred-thirty-eighth reference is a book by the author,
 145. 139. The hundred-thirty-ninth reference is a book by the author,
 146. 140. The hundred-fortieth reference is a book by the author,
 147. 141. The hundred-forty-first reference is a book by the author,
 148. 142. The hundred-forty-second reference is a book by the author,
 149. 143. The hundred-forty-third reference is a book by the author,
 150. 144. The hundred-forty-fourth reference is a book by the author,
 151. 145. The hundred-forty-fifth reference is a book by the author,
 152. 146. The hundred-forty-sixth reference is a book by the author,
 153. 147. The hundred-forty-seventh reference is a book by the author,
 154. 148. The hundred-forty-eighth reference is a book by the author,
 155. 149. The hundred-forty-ninth reference is a book by the author,
 156. 150. The hundred-fiftieth reference is a book by the author,
 157. 151. The hundred-fifty-first reference is a book by the author,
 158. 152. The hundred-fifty-second reference is a book by the author,
 159. 153. The hundred-fifty-third reference is a book by the author,
 160. 154. The hundred-fifty-fourth reference is a book by the author,
 161. 155. The hundred-fifty-fifth reference is a book by the author,
 162. 156. The hundred-fifty-sixth reference is a book by the author,
 163. 157. The hundred-fifty-seventh reference is a book by the author,
 164. 158. The hundred-fifty-eighth reference is a book by the author,
 165. 159. The hundred-fifty-ninth reference is a book by the author,
 166. 160. The hundred-sixtieth reference is a book by the author,
 167. 161. The hundred-sixty-first reference is a book by the author,
 168. 162. The hundred-sixty-second reference is a book by the author,
 169. 163. The hundred-sixty-third reference is a book by the author,
 170. 164. The hundred-sixty-fourth reference is a book by the author,
 171. 165. The hundred-sixty-fifth reference is a book by the author,
 172. 166. The hundred-sixty-sixth reference is a book by the author,
 173. 167. The hundred-sixty-seventh reference is a book by the author,
 174. 168. The hundred-sixty-eighth reference is a book by the author,
 175. 169. The hundred-sixty-ninth reference is a book by the author,
 176. 170. The hundred-seventieth reference is a book by the author,
 177. 171. The hundred-seventy-first reference is a book by the author,
 178. 172. The hundred-seventy-second reference is a book by the author,
 179. 173. The hundred-seventy-third reference is a book by the author,
 180. 174. The

3. Assumpsit is the proper remedy to enforce a statutory obligation where no other remedy is provided.

450 Md. 376

43 N.H. 451

This case involved the personal liability of the defendant for taxes. The question was whether or not you could sue him personally and recover judgment against him and levy on any property he might have. There was no provision for it, although legislation may provide for a remedy against a party which shall be by action of assumpsit. In the absence of any such provision, the courts are not uniform as to whether there can be a remedy against a man in assumpsit personally for having failed to pay taxes. Many of them hold you can not sue personally, because the law makes certain property liable to taxation and if you sue him personally and get judgment you will make that judgment a lien on his entire estate. Where the courts hold that you can sue him personally, this is a quasi-contractual obligation.

(a) Where the law imposes the obligation a promise may be implied against the express declaration of the parties.

130 Mass. 596

#### Obligations Arising from Individual and Domestic Status.

These are obligations arising from (A) infancy;

(b) Insanity; (c) the relation of parent and child; (d) the relation of husband and wife. Of these in their order.

(a) Infancy. The infant's liability for necessaries is a quasi-contractual liability, because of the fact that he has not the capacity to make an agreement, and not having the capacity to make an agreement the obligation is imposed upon him by law, for the good of the state and for his own personal benefit. It is a valid contract but it is not a pure contract.

See Tyler on Infancy and Coverture 100

To show that it is a quasi rather than pure contract:-

1. The contract price can not be recovered. If an infant makes a contract for necessaries and contracts to pay a certain sum for them, while you can recover in assumpsit what the necessaries are reasonably worth, you can not recover the contract price.

2. An infant is not liable on a promissory note given for necessaries. About this there is some dispute.

See 10 Johnson 33

(Contrary) 10 Metcalf (no page given)

See 1 Daniel Negotiable Instrument 200; where these cases are reviewed and discussed.



3. Infancy is not a defense to an action in quasi-contract where the infant's tort is waived. That is, where you can waive the tort and sue in assumpsit, you are suing in quasi-contract and infancy is not a defense.

58 Me. 254

1 Gray 506

Insane Persons. Insane persons are liable for necessities furnished them on an action in quasi-contract, and the rule in reference to their obligation are the same as those of the infant.

37 Ala. 496

29 Am. Dec. 67

Husband and Wife. The husband's obligation to pay for necessities furnished the wife may be quasi-contractual. Some are quasi-contractual and others are purely contractual, and we must keep them distinct.

1. Where the husband is held liable on the theory of implied agency, as is often done, it is generally a case of pure contract.

That is, if the husband and wife are living together, from that very fact there would be an implied agency on the part of the wife to bind the husband for necessities, but that agency is implied from fact; it is not a quasi-contractual obligation but a pure contractual obligation.

2. Where he is held liable against his express direction not to furnish necessities, he is liable only in quasi-contract.

Thus if he has turned her away without cause, you can furnish necessities to the wife and sue him in assumpsit on a quasi-contractual obligation.

34 Eng. Law & Eq. 214

(a) The husband may be held liable in quasi-contract to an attorney for his services to the wife in procuring divorce. That seems to be ridiculous, but it has been held so in England. I shall call your attention to some cases to the contrary in this country.

(b) So he may be held liable in contract for her attorney's fees and costs on a complaint and warrant made by the wife to make him keep the peace.

39 N.H. 123

28 Wis. 517

(c) Only reasonable compensation can be recovered in quasi-contract in these cases. She can not make any and all kinds of contracts.

30 Ga. 81

(d) The weight of authority is that an attorney can not recover of the husband for services in divorce proceedings.

I told you that some courts hold that they can do that, but the weight is the other way, on the theory that divorce

-is up ni hold    us  
no. even    10/10/11    1/10/11  
1/10/11    1/10/11    1/10/11

[illegible]

REPORT OF THE  
COMMISSIONER OF THE  
GENERAL LAND OFFICE

the  
and  
series

1. The first part of the document is a list of names and their corresponding addresses. The names are: "John Doe", "Jane Smith", "Bob Johnson", "Alice Brown", "Charlie White", "David Green", "Eve Black", "Frank Gray", "Grace Pink", "Henry Blue", "Ivy Yellow", "Jack Purple", "Karen Red", "Leo Orange", "Mia Silver", "Noah Gold", "Olivia Bronze", "Pete Copper", "Quinn Iron", "Rita Tin", "Sam Lead", "Tina Zinc", "Uma Nickel", "Victor Platinum", "Wendy Silver", "Xavier Gold", "Yara Bronze", "Zoe Copper", "Adam Iron", "Eve Tin", "Frank Lead", "Grace Zinc", "Henry Nickel", "Ivy Platinum", "Jack Silver", "Karen Gold", "Leo Bronze", "Mia Copper", "Noah Iron", "Olivia Tin", "Pete Lead", "Quinn Zinc", "Rita Nickel", "Sam Platinum", "Tina Silver", "Uma Gold", "Victor Bronze", "Wendy Copper", "Xavier Iron", "Yara Tin", "Zoe Lead".

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 08-17-2006 BY 60322

1. To all the people of the world  
2. To all the people of the world

the  
agency

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a formal communication, and it is written in a very dignified and official style. The President begins by addressing the Congress, and then he proceeds to discuss the state of the Union. He mentions the progress of the country, and he also mentions the difficulties that the country is facing. He then goes on to discuss the policy of the administration, and he ends the letter by expressing his confidence in the Congress.

[illegible]

67  
 68  
 69  
 70  
 71  
 72

Page 10  
You will find the letter  
in the file  
The letter

*Journal of Management Education*

[illegible]

550-465-00

2.  $\{1, 2, 3, 4, 5, 6, 7, 8, 9, 10\}$

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
DATE 08-01-2001 BY 60322 UCBAW

|       |      |           |         |
|-------|------|-----------|---------|
| Don't | 100% | all gains | 1. 100% |
| 100%  | 100% | 100%      | 100%    |
| 100%  | 100% | 100%      | 100%    |
| 100%  | 100% | 100%      | 100%    |



is not a necessity.

2nd Bishop Marriage and Divorce 974

Contracts Dictated by Reason and Justice.

As a matter of fact reason and justice do not dictate anything. The whole question here is whether assumpsit can be maintained under the circumstances; that is, whether there is a quasi-contractual obligation arising out of the facts in a particular case.

The first form is the waving of tort and suing in assumpsit. The right to do this depends a great deal upon the nature of the tort and whether the wrong-doer has received anything of value.

The doctrine of quasi-contract under this head is said to be placed upon the theory that the defendant shall never be allowed to enrich himself at the expense of the plaintiff, and wherever he does, a quasi-contractual obligation arises to pay the plaintiff what the defendant ought to pay in order to make the parties on an equal footing. But I do not know whether unjust enrichment is a satisfactory term or not. The question is under what circumstances may tort be waived and assumpsit brought. The question was discussed in Torts. I will give you some general propositions on the subject.

1st. A purely personal wrong, such as assault and battery or libel and slander, can not be waived and assumpsit maintained.

(a) But if benefit has been actually received, tort may be waived, even though it be a personal injury.

That is to say, if the wrong-doer not only committed personal wrong but also received substantial benefit in the eye of the law, then you can waive tort and sue in assumpsit.

18 Ind. 440

In this case, a man was falsely imprisoned, and a contractor got the benefit of his services by contract with the prison authorities. After he was released from prison he sued the contractor and was allowed to recover on an implied promise by law that the contractor agreed to pay him what his services were reasonably worth. That is stretching the law a little but it was done in Indiana.

See 9 Mo. 493. To the contrary, 147 Mass. 307

• **Figure 10.10** The effect of the number of trials on the magnitude of the primacy effect.

007011

-high school  
 of the  
 on the  
 of the

1. The first of these is the fact that the  
2. second of these is the fact that the  
3. third of these is the fact that the  
4. fourth of these is the fact that the  
5. fifth of these is the fact that the  
6. sixth of these is the fact that the  
7. seventh of these is the fact that the  
8. eighth of these is the fact that the  
9. ninth of these is the fact that the  
10. tenth of these is the fact that the

The question was discussed.

I am very much interested in your account of what happened at the meeting.

I have been thinking about it a great deal lately.

I hope you will be able to tell me more about it soon.

Very truly yours,

[Signature]

General Repositioning of the ...  
...  
...  
...  
...  
...  
...  
...  
...  
...

This Missouri case was where a woman was fraudulently induced to marry a man who was already married. She lived with him through his natural life; then made her claim as his widow and found that he had a wife still living. Then she filed her claim in assumpsit against his estate, averring that he promised to pay her what her services were reasonably worth while she lived with him. Of course he did not do it, but the question was whether there was a quasi-contractual obligation which might be enforced against his estate. The court of Missouri holds that she may enforce the obligation under those circumstances.

The Massachussetts case is squarely the other way, on the theory that she lived with him not expecting to receive any compensation, and therefore she can not afterwards recover compensation.

I do not like the Massachussetts case as well as the Missouri case.

-----oOo-----

May 27, 1901

[illegible]

..... ( ) .....

1921, 1922, 1923

## L E C T U R E II.

----oOo----

We were finishing up the subject of quisso-contracts, and came to that portion of it which pertains to such obligations as reason and justice dictate. I had given you the first proposition that a purely personal wrong did not give rise to any quasi-contractual obligation.

2. A simple trespass to personal property resulting in injury will not sustain an action in quasi-contract.

The basis of this action, as I told you, was some benefit to the wrong-doer; and thereof if he received no benefit from the trespass, as where he had destroyed another's watch, the action of assumpsit could not be maintained.

58 Minn. 112 . 94 Ga. 347  
20 Kans.90

3. Conversion of personal property justifies an action in quasi-contract.

There are two propositions upon that subject in this country that are in conflict, and I will give them both to you and tell you which I think will prevail eventually.

(a) At the common law assumpsit could not be maintained when the goods had not been sold by the wrong-doer.

That is, if a man took your horse, you might sue him in trover or trespass but not in contract unless the horse had been sold, and if you sued him in contract you could recover only what he had received and not what the horse was worth. That is said to be the rule in Michigan today, but in most states it is no longer the law.

22 Mass. 285

(b) By the weight of authority assumpsit for goods sold and delivered may be maintained for goods converted, even though they have not been sold by the wrongdoer.

Most of the states take the position at the present time that if a man should steal a horse or any other personal property and use it, you can sue him in assumpsit, not for money had and received but for goods sold and delivered, on the theory that you have sold that horse to him and delivered it and an implied promise arises that he must pay what it is reasonably worth.

121 N.Y. 161

4. Trespass to real estate resulting in profit to the wrongdoer will sustain assumpsit.

(a) Pasturage of cattle trespassing will sustain assumpsit.

12 Metcalf 42  
Contra. 22 Vt. 516



Where cattle or horses have trespassed onto the land of another, of course the owner of the land can sue in trespass; but the question has arisen whether the owner of the land can sue in assumpsit and set up the the owner of the cattle promised to pay what damage might have been done. In my judgment he may recover at law in an action of assumpsit. The obligation springs from quasi-contract, and is not expressed or implied but is imposed by law.

(b) A count for use and occupation of real estate (that is, a promise to pay what the use and occupation of the real estate is reasonably worth where it has been occupied) may be maintained against a trespasser as against a tenant holding over after notice.

88 Pa. St. 335

But not against a mere trespasser, with whom there has been no contract relations.

The law upon this subject of use and occupation and the right to bring assumpsit for it is decidedly unsettled. There is a line of cases which holds that you can sue in assumpsit and recover in contract ~~as~~ against a mere trespasser; but there is another line of authorities which holds that you cannot sue in assumpsit and recover in quasi contract unless there was a previous contractual relation existing between the parties, as landlord and tenant. In Michigan the law is with the second class of authorities.

24 Ala. 420      45 Me. 41

(c) Cutting trees and removing stone from the earth will sustain contract, if replevin or trover would lie.

This is a troublesome question. I shall give you one authority supporting this proposition and one to the contrary. The contrary opinion holds that contract will not be sustained unless the trees or stone have been converted into money and sold. But I should say that the weight of authority today is that where anything affixed to the freehold has been taken away and converted to the use of the defendant, he may be sued in assumpsit wherever you can maintain trover or replevin.

58 Minn. 112      Contra. 45 N.H. 202

5. The tort can not be waived if the defendant was in adverse possession of the land, because you can not try the title to land in an action of assumpsit.

8 N.Y. 115

#### MISTAKE.

This is one of the most fruitful sources of quasi-contractual obligations, but there is no need to discuss it at length because the principles are very simple.

1. This action is usually for money had and received, or for money paid by mistake. If there was an actual mistake a quasi-contractual obligation arises.

2. It may be maintained for the value of services rendered under mistake of material fact.

46 Mo. App. 496

1. Brief outline of the work done during the period of the study  
2. Description of the work done during the period of the study  
3. Description of the work done during the period of the study  
4. Description of the work done during the period of the study  
5. Description of the work done during the period of the study  
6. Description of the work done during the period of the study  
7. Description of the work done during the period of the study  
8. Description of the work done during the period of the study  
9. Description of the work done during the period of the study  
10. Description of the work done during the period of the study

[illegible]

522 36 60

[illegible][illegible]

1. *Phragmites australis* (Cav.) Trin. ex Steud.

... (b) (5) DPP, (b) (5) ACP, (b) (5) AWP, (b) (5) ADP, (b) (5) ADP (c)

10. The following is a list of the names of the persons who have been named in the above-mentioned affidavits as having been in the possession of the same at the time of the same being seized:

[illegible]

1. The first part of the document is a letter from the author to the editor, dated 1968. The letter discusses the author's interest in the subject of the book and the author's intention to write a book on the subject. The author mentions that the book is a result of a long and arduous process of research and writing.

2. The second part of the document is a preface to the book. The preface discusses the author's motivation for writing the book and the author's intention to provide a comprehensive and up-to-date account of the subject. The preface also mentions that the book is a result of a long and arduous process of research and writing.

3. The third part of the document is the main body of the book. The main body is divided into several chapters, each of which discusses a different aspect of the subject. The chapters are:

- Chapter 1: The history of the subject
- Chapter 2: The theory of the subject
- Chapter 3: The practice of the subject
- Chapter 4: The future of the subject

4. The fourth part of the document is the conclusion of the book. The conclusion discusses the author's findings and the author's conclusions about the subject. The conclusion also mentions that the book is a result of a long and arduous process of research and writing.

5. The fifth part of the document is the index of the book. The index lists the topics covered in the book and the pages where they can be found.

608 11-11-37

1. The first part of the document is a letter from the author to the reader, explaining the purpose of the study and the methods used.

3. The  $\mathcal{H}^1$ -norm of the difference between the exact solution and the numerical solution is of order  $\mathcal{O}(\Delta t)$ .

Figure 1. Schematic representation of the experimental design. The subjects were divided into two groups: the control group and the experimental group. The control group was divided into two subgroups: the control group and the control group. The experimental group was divided into two subgroups: the experimental group and the experimental group.

Figure 1. Schematic representation of the experimental design. The subjects were divided into two groups: the control group and the experimental group. The control group was divided into two subgroups: the control group and the experimental group. The experimental group was divided into two subgroups: the control group and the experimental group. The control group was divided into two subgroups: the control group and the experimental group. The experimental group was divided into two subgroups: the control group and the experimental group.

10-10-68  
10-10-68

10. The following information is being furnished to you for your information:

1. The first step in the process of identifying a problem is to define the problem clearly. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes of the problem. Once the causes of the problem have been identified, the next step is to develop a plan to address the problem. This involves identifying the actions that need to be taken to address the problem and determining the resources that will be needed to implement the plan. Once a plan has been developed, the next step is to implement the plan. This involves taking the actions that have been identified in the plan and putting them into practice. Finally, the last step in the process is to evaluate the results of the plan. This involves determining whether the plan has been successful in addressing the problem and identifying any areas for improvement.

[illegible]

26-574-1-1



In this Missouri case a slave not knowing he was emancipated had worked for a series of years for his master, and afterwards brought suit to recover for the value of the services.

See also 40 Minn. 399 (Case of guardian and ward)

2. Benefits conferred without request will sometimes sustain an action. The benefit must have been imposed on the defendant in the interest of the public.

If A should pay B's debt to C, he could not recover from B; but if the law imposed a duty upon B and that duty is one in which the public is interested in having it done, and it is not performed, then a third person may perform that duty and recover.

1 H. Blackstone 90

This was a case in which the father of a woman sued her husband to recover expenses that he had paid for the funeral of the wife of the defendant.

2. If the benefit is conferred with apparent right and not officiously, assumpsit will lie.

106 Mass. 286

This was the case of a boat which had been lost at sea and cast ashore. The plaintiff took care of the boat and spent money in having it repaired. The owner finally appeared and demanded the boat. The plaintiff sued the owner on the theory that he had promised to pay him what he had expended in repairing the boat. It was held that inasmuch as the plaintiff had conferred this benefit under an apparent right, assumpsit would lie.

Money paid under duress or legal compulsion may be recovered in quasi contract.

8 Term Rep. 308

14 Q.B.D. 811

That finishes all I care to say on the subject of Quasi-contract.

## CONTRACTS PROHIBITED BY STATUTE.

You remember Anson gives us three sources of illegality: contracts contrary to statute, contrary to rules of common law, and against public policy. I want to speak about statutory prohibition in the U.S.

There is a difference between the law of the U.S. and the law of England on this subject. Parliament can prohibit anything. They have no written constitution, and no law which prevents them from taking private property without due process of law. With us it is entirely different. We have both the Federal and the State Constitutions. When you come to statutory prohibition it is a troublesome question in this country to what extent you are interfering with the personal liberty of the citizens.

[illegible]

recovered for him in 1941. The following is a list of the items recovered for him in 1941:

2 enclosed. All  
you are to do is to send me a copy of the  
internal and external mail to the same place as the enclosed

Det. SAs Edwin Wernsgut and Kenneth J. ...  
... ..  
... ..

...to ... ..  
... ..  
... ..  
... ..  
... ..  
... ..  
... ..

RECEIVED  
JAN 10 1964  
U.S. DEPARTMENT OF AGRICULTURE  
WASHINGTON, D.C.

SECRET

[illegible]

Article 4, Section 1, of the U.S. Constitution provides "Nor shall any state deprive any person of life, liberty or property without due process of law".

Blackstone gives three absolute rights of individuals, personal liberty, private property, personal security. Judge Cooley adds the right of contract and the right to form the marriage relation.

1. In the exercise of police powers the state may prohibit the making of contracts where the public good demands the restriction.

This does not interfere with the constitutional provision that no legislature shall pass a law impairing the obligation of contracts. That constitutional provision applies to contracts already made when the state is passed. We are speaking now of the power of the legislature to say that in future no such contract shall be made.

(a) As a general rule the courts will not review the legislative discretion in this matter.

127 U.S. 678      99 N.Y. 377

The U.S. Supreme Court and the N.Y. Supreme Court differ as to the right of the legislature to prohibit the sale of oleomargarine.

2. The right of contract is a natural right, which can not be interfered with on the pretense of public good, where the general public is in no way affected by it.

113 Pa.St. 431

That was a case in which the legislature had passed a law prohibiting making of contracts between companies and employees for receiving a certain part of their wages in store orders. The court held that was an unlawful interference with the freedom of contract. The court held it was an attempt to prevent persons who were sui juris from making their own contracts.

109 N.Y. 389

70 Mich. 534

This last case arose from an attempt on the part of the legislature to prohibit liquor dealers from becoming surety on the liquor bonds. The Supreme Court of this state held that the right to become surety on any man's bond was a property right and the legislature could not deprive a man of that right. I have never believed in that opinion. The general principle that the right to become a surety is a property right is true, but here is a bond running to the public and the public has a right to say what kind of sureties it will have.

147 Ill. 66

In this case, there was a statute providing that corporations should pay their laboring men weekly. The court held that it was an unlawful interference with the right of contract.

See also, 33 W. Va. 179

115 Mo. 307.

...the ... of ...  
...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...  
...the ... of ...

## LECTURE III.

---000---

## GAMES OF CHANCE.

1. Gaming exists wherever a stake is laid on the chances of a game. 51 Mich. 203.

In this case wagers were laid in pool rooms of Detroit on the result of a game of base ball. It was contended that that was not gaming within the meaning of the statute.

The Supreme Court of this state held that it was.

Where the statute prohibits gaming money bet or premiums offered can not be recovered by the winner.

- 1 C. & P. 613 (dog fight)
- 2 Willson 36 (foot race)
- 3 Campbell 140 (cock fight)
- 24 Mich. 441 (horse race)

(a) But a premium offered for a trial of speed in horse racing is usually regarded as collectable. The cases are not uniform.

The disposition of some courts is to hold that a premium offered for horse racing can not be recovered if it is not paid, but I think the weight of authority is the other way. Public sentiment is not strong enough to uphold the laws against horse racing.

- 81 N.Y. 522
- 63 Ind. 58
- 57 Iowa 481

2. Most states forbid the lottery business. In such case the purchaser of a ticket can not recover what he has drawn.

- 1 Watts & Sargent 181
- 28 Ohio St. 251

Contra, 4 N.H. 285

3. In games of chance the money may be recovered of the stakeholder at any time before it is paid.

4. Any contract to reimburse agent for losses incurred by him in gambling contracts is void.

You remember in Anson a case was cited and the principle announced that if a broker had been hired in a gambling transaction and he had incurred expense, he might recover his commissions and expenses. That is the English law, but by the weight of authority in this country it is not the law.

- 71 Ga. 200
- 52 Wis. 593
- 97 Ind. 191

## LIQUOR LAWS AS AFFECTING CONTRACTS.

Tiedman in his work on Police Power argues that these laws are unconstitutional, that they are an unlawful interference with the private right to do business, and that a law prohibiting

[illegible]

the sale of intoxicating liquors is on theory against the Constitution of the U.S.

Tiedman on Police Power, 306-7.

Some courts also doubt the constitutionality of these laws, but they all admit that the law is settled.

1. On the sale of liquors in violation of law, the seller can not recover the purchase price.

26 Vt. 184

14 N.H. 294

(a) The fact that the vendor supposed he was authorized to sell is immaterial.

47 Me. 471

(b) Simple knowledge that the purchaser is going to sell the liquors in violation of law does not prevent the seller from recovering the price.

On this subject you will find the cases not agreed.

2. An account stated on an illegal sale of liquors is void. That is, if the purchasers and sellers get together and agree upon the amount due, that agreement is without validity. A promissory note given is without validity because there is no consideration for it.

108 Mass. 579

3. Payments on an account consisting of legal transactions, and also an illegal sale of liquors, will be applied first to the legal transactions, unless there is some agreement to the contrary.

105 Mass. 87

4. As a general rule the statutes apply only to sales within the state.

3 R.I. 175

The liquors in this case were sold in New York and they were to be used in Rhode Island. The action was brought in Rhode Island. The Rhode Island statute prohibited the sale of liquors, whereas the New York law permitted it. The question arose whether the Rhode Island statute could be enforced as against a sale made in New York. The courts do not agree upon this subject. It was held in this case that the sale in New York could be enforced, because the Rhode Island statute had no extra-territorial force.

(b) The sale of intoxicating liquors to be used in another in violation of the law will not sustain an action.

41 Vt. 655

Sale of liquors in New York to be used in Vermont. The facts indicated clearly that both parties contemplated a sale of those liquors in Vermont in violation of the Vermont law, and that being so the purchase price could not be recovered.

See also 47 Me. 58  
6 Iowa 410





(c) But if the sale was valid where made and there was no fraudulent intent to aid the purchaser in violating the laws of another state, the sale will be upheld.

1 Gray 536

(d) Sales of imported liquors in the original package are not in violation of a state law against selling liquors.

135 U.S. 100

Iowa had a law against the sale of intoxicating liquors, a strong prohibitory law. The defendant in this case imported some liquors from another state, and sold them in the original package. He was prosecuted, and the defense was that the prohibitory law of Iowa was in violation of the Constitution of the U.S. in that it was an unlawful interference with interstate commerce. The defendant prevailed. The court held that so long as he did nothing but handle the original package across the state line he could sell, but what the purchaser could do was a matter of conjecture and suspicion.

#### CONTRACTS MADE ON SUNDAY.

At the common law a contract made on Sunday was just as good as a contract made on a secular day. It is only by virtue of the statutes that these contracts are prohibited.

43 Mich. 58

1. Sunday laws, those prohibiting the making of contracts of the doing of business are not an undue interference with religious liberty.

53 N.W. Rep. 391

This is perhaps one of the most exhaustive opinions on the subject of Sunday laws. There has been a contention for many years that these Sunday laws are in violation of one's constitutional right of religious liberty. But the question is now thoroughly settled that they are not an undue interference with religious liberty. There has been much discussion as to whether Christianity is a part of the common law. The courts have settled the question not on the ground that these Sunday laws are for religious purposes, but on the ground of public health and comfort and under the police power of the state they are allowed.

2. Where the law provides that any one who shall do any "labor, work or business" on the Lord's day shall be punished, all secular business is presumed to be included.

The statutes in the states differ. Some prohibit common labor, some labor or other business, some all secular business, and some say any business whatsoever. This does not include mutual promises of marriage.

5 Cushing 539.



(a) Where only "servile labor" or "working" is prohibited, commercial contracts are valid.

A promissory note in such a state is just as good on Sunday as any other day.

13 Wendell 425

Where the statute prohibits the exposing of goods for sale on Sunday, as it does in New York, that does not prohibit a single sale. A horse trade is just as good on Sunday in New York as on any other day, because that is not exposing goods for sale within the meaning of the statute.

55 N.Y. 682

44 Barber 618

(b) The making of a contract is not labor, within the meaning of the Sunday laws; but in my judgment it is business. The distinction perhaps is a fine one, but it exists.

21 Kans. 238

107 Ill. 429

Contra, 4 Ind. 619

62 Ind. 365

These cases are not reconcilable at all. In the Kansas case the statute provided for "common labor" and it was held that an agreement to sell cattle made on Sunday was valid. The Illinois case was where one entered into a contract for the sale of a vessel on Sunday, and it was held that that was not common labor. But in the Indiana cases it is held that the giving of a promissory note on Sunday is common labor. I do not believe these last cases are good law. Some people get upon the bench who are religious and some who are irreligious, and there is a difference of opinion which no human power can prevent.

(c) In general, commercial transactions on Sunday are void only when secular business is prohibited.

(d) A written contract signed on Sunday is valid if delivered on Monday or any substitute secular day.

3. Works of necessity or charity are permitted in all the states.

The question then arises what is necessity or charity so that a contract may be made. It is not clear, but I will give you one or two suggestions.

(a) Work on Sunday to prevent loss on a secular day is not a necessity.

112 Mass. 467

This was a case in which it was necessary to run a power mill day and night throughout the week. They could not afford to stop the mill so as to make repairs so they made the repairs on Sunday. The question was whether or not the services rendered on that day could be recovered for. The plaintiff said it was a work of necessity. The court held that it was not a work of necessity, because it was done simply to prevent loss on a secular day.

But the preserving of property exposed to imminent danger on Sunday



is a necessity.

The most common example is the gathering of crops on Sunday to prevent damage by rain. As a rule that is not a violation of Sunday laws.

22 Barber 539

Whatever is essential to be done in order to preserve life or property is a matter of necessity.

128 Mass. 148

14 Vt. 332

(b) Charity is active goodness. All acts to relieve suffering and acts connected with religious worship, are regarded as works of charity.

43 Mich. 1

This was a case in which the question was whether a subscription to a church on Sunday was a good contract. In Michigan and most states of the Union those contracts are sustained on the ground that it is an act of charity.

98 Pa. St. 389

Contra. 62 Ind. 365

This last was the same case in which the Indiana Court held that a promissory note given as a subscription to a church was common labor and was not a work of necessity or charity and was therefore void. The case I do not think is in accord with the weight of authority.

-----oOo-----

June 4, 1901

[illegible]

$\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$

$$(\mathbf{A}^T \mathbf{A})^{-1} \mathbf{A}^T \mathbf{y} = (\mathbf{A}^T \mathbf{A})^{-1} \mathbf{A}^T (\mathbf{A} \mathbf{x} + \mathbf{e}) = \mathbf{x} + (\mathbf{A}^T \mathbf{A})^{-1} \mathbf{A}^T \mathbf{e}.$$

L E C T U R E S

O N

C R I M I N A L L A W .

B Y

P R O F . J E R O M E C . K N O W L T O N .

) \_\_\_\_\_

Reported by B. K. Wheeler.

\_\_\_\_\_

U N I V E R S I T Y O F M I C H I G A N .

Law Class of 1905.

\_\_\_\_\_

Edwards Bros. ----- Publishers,

Ann Arbor, Mich.

1902 - 1903.





## LECTURE I.

--- oOo ---

Now the very first thing that every man ought to do when he commences the study of a subject is to inquire about the Authorities on it. What are the authorities on the subject of Criminal Law and by way of introduction let us go back.

The earliest authorities are those of course which ought to attract our attention first and we want to go back and ~~xxxx~~ get down at the root of the matter, and the earliest authority as far as I know is a little book written in the reign of Henry the First and published in about 1100.

The interesting fact of the book is not that it contains so much law but is the fact that it does not define crimes at all. It gives all crimes of common law and pronounces punishment but does not define one of them. It pronounces the punishment for a person guilty of murder so, and of burglary so, but what they are is not defined. It is taken for granted that in 1100 every one knew what they were and all that it had to do was to provide punishment, in other words that is one indication of the Unwritten Law.

The next book after this was Bracton, then comes Coke, Hale and Hawkins. These are four great landmarks before Blackstone's time.

Bracton's work was written about the middle of the 13<sup>th</sup> Century. This work can be found in the library, written in double column one in Latin and the other in English. If anybody should study Bracton for a moment they would be impressed with the fact that Blackstone must have drawn almost entirely his knowledge of the Law from Bracton.

Now, speaking of Blackstone Commentaries, which I suppose you are all familiar with, do you know that when Blackstone wrote these commentaries he was only 32 years of age, yet from the time that he wrote them along about 1750 until the present time, as far as the United States is concerned, it is a great book. Modern lawyers may laugh but it won't do them any good. Blackstone is here and has been here for over a century, and is likely to stay here for sometime to come. Why is that so? Not because Blackstone wrote any better than anybody else can write but he wrote from 1758 to 1781 along a period of some 20 years - edition after edition which were the results of a course of lectures which were given at Oxford. He was writing law of England just when we were breaking away from England, anything written before was too early. Our common law is based on England's common Law and that is the reason why it is the best book - it was written at the best time.

The next one after Bracton was Hale's Pleas of the Crown, published in 1736, and was published after his death by manuscript. This is a book of great merit.

The next one is Hawkins "Pleas of the Crown". That was published sometime after, it supplies some of the deficiencies of Hale and Bishop. Bishop is the great authority of America on Law,



he was nevertheless a very conceited man. Read some of Bishops prefaces to some of his books and you will at once see the truth of this statement. He was, however, a very great writer and a man of profound learning.

Of course, I pass by Blackstone, because you will be familiar with him if you are not already.

Since Blackstone's time the only new law writings which are of very great importance is Russell on Crimes. It is in two volumes and is to be found in the library of most American Lawyers.. Of the American Authorities say Bishop is one of the most stately writers that I ever read, if he has anything to say.

Then there is Wharton. He has two or three volumes on subject.

Then Washburn has a volume, also, there is one by Lawson one by Clark,. One of the best books that has come out recently is a book written by Marshall and Clark. It is in two volumes and is certainly a very inexpensive book..

Now, many attempts have been made to define Crime. I am not going to give you a definition of Crime today, I will however, call attention to the fact that there is as many definitions as there are crimes. These definitions do not agree for manifest

reasons, and the reason is a clear one. Crime as a local concert has not been the same at all times. This is evident from the various histories upon which proscriptions have been made. In the early history of England, Crime seems to have been regarded as private wrong, rather, ~~than~~ punishable by those injured by them and that was done by private war. In the early history of the world afterwards by moral sanction and then by public execution of justice as it is now done. In England and in this country crimes are regarded as offences against the public, a public wrong and punishable through the administration of the Law.

Now, there were three epoches in the history of criminal Jurisprudence. The first period was a period in English Law, know as the period before the Norman Conquest. Criminal prosecution and the accusation was not by written complaint by was by common report. If a party was accused of crime, if he could get a dozen of his neighbors or ancestors to come and swear that they beleived in him he was sent free. Much like a certificate of good moral conduct. Of course, the abuses to which that lead resulted in its abolishment before the Norman Conquest really arose.

The next Trial of importance before the Norman Conquest was Trial by Ordeal. Trial by Ordeal was trial by fire and water.

If a man was accused of crime he would strip his hand and elbow and dip his arm into moulten lead, and if he was unharmed he was considered not guilty of crime.

The Theory of that Trial was this: That if a man was innocent he would be protected through miracles, in other words



it was held that the Almighty would protect the innocent. That of course, passed away and only remains as a history.

The next period was that know as the Norman Conquest. The Norman Conquest brought with it some very important changes in trying issues of facts.

One was the Kings Court. That was established by the Norman Conquest and under it was Accusation by Inquest, and that was the origin of our Grand Jury or Coroners Inquest.

This really was the beginning in my judgement of the idea that crime was to be punished as an offence against the public instead of an individual wrong.

This Norman Conquest also, brought with the famous Trials by Battle. If one man thought that he had been wronged by another he issued a charge and each of the two men would select a champion, and the two champions would fight it out. The last recorded example of that to be found in England was in 1638 and yet every man had a right to demand trial by battle until 1819.

Now, the last epoch was TRIAL BY JURY. Now by Trial By Jury I mean the Trial by jurors. Now the term jury you must watch very closely as it has different meanings or is used in different senses., as Grand Jury, Petit Jury etc.

I am inclined to think that Trial by Petit Jury was not reported until about the middle of the 13th century. But if anyone asks you the origin of it, you have but one wise answer to make and that is "I dontKnow!"

----- oOo -----



## LECTURE   II.

We will take up this afternoon, First: some of the general principals pertaining to Criminal Law, and then take up the subject of specific crimes. So the first few weeks of the semester will be given to the discussion of general principles, and general principles are broadened into four subdivisions.

The first is crimes defined and distinguished.

The second, is conditions of Criminality, and by that I mean those conditions which must exist or there may be no crime.

Third is Parties to the Crime.

Fourth is Classification of Crime.

Now those are four subjects which I want to discuss in a few lectures and the first one is an act injurious to the public and forbidden by law under pain of punishment.

The best definition in my judgement aside from the one I gave you is one by a very learned writer of Criminal Law. -Fitz. Jas. Stevens, and he describes it as "an act forbidden by Law under penalty of punishment."

There is nothing in the nature of crime which determines that a particular revengeful act is criminal or not. Crimes must be declared by law. Our Criminal Law has pronounced to be moral turpitude what legislature has declared to be criminal. Moral Turpitude is almost universally an element in crime.

A man purchases and butchers a calf under four days of age. He says that he was so told and fully believed that the calf was above the statutory age. The jury held that if he fully believe that the calf was above the statutory age there was no crime. The court held otherwise. There may be a crime without moral turpitude.

Second: The crime must be distinguished from a Tort. The one is a public wrong and the other is purely a private wrong. Now it is true that nearly every crime involves a tort but most torts do not involve any crime.

If a man assaulted another seriously injuring him there is a public wrong, the crime is called assault and battery. There is also Civil Wrong. The Civil wrong is known as trespass., and the party assaulted may sue and recover damages.

At the present time the general rule is that a Civil Action may be maintained at the same time as that of a Criminal Action for the same act. Larceny is a crime which may be punished by the public as a crime, at the same time the person may bring an action to recover his property.

The Eng. Rule was that a person who had been wronged by Crime could not bring a civil action. That rule has been enforced in some of our states but I think the weight of authority is the other way.

discussed. See 1st of Bishop Section 267. where this is 1st of Hale's Pleas of the Crown 372.

12th of the East's Rep. 409

16 Michigan 180.





6 New Haven 654

In some states this principle is regulated by the statutes.

Now, the very first element in Crime is that element that there is no crime without OVERT ACT. You understand that the law does not punish a Criminal FRAME OF MIND, unless it is accompanied by some overt act. Without the act there can be no crime.

7 Term Reps. 514

Law of Cannon held that it was a principle of natural justice that the intent and act must both occur to constitute a crime. Now this may be illustrated. For instance. The simple possession of counterfeit coin without the intent to pass it is as good as no crime at all at the common law.

16 Eng. Law in "Equity.

Bishops Criminal Law 204.

The overt act must not be too far removed from the Criminal Result, Approximate Cause.

Approximate and Remote cause differs from Remote cause. If you charge a person with wrong and the effect must be so closely in unity that one must be said to be the cause of the other.

Now that is illustrated:

14 Cox Criminal Cases 427

Now, this Criminal Intent of Overt Act to which I refer must concur in point of time.

See 14 Johnson 294

Take for example a larcensy case, now, larcensy involves first a trespass and second a Criminal intent and deprives the owner his ownership of his property. There must be an overt act and the criminal intent. These two must exist at the same time.

If one finds goods and at the time he picks them up intends to find the owner, and then afterwards comes to the conclusion that these goods are good enough to keep and does not return them to the owner. He is not guilty of larcensy, because at the time of taking there was no criminal intent, but if a man picks up a wallet of money intends to keep it even though he knew who the owner was he is guilty of larcensy.

The next thing we must take up is an Attempt to Commit Crime. An attempt is an act in part execution of a crime.

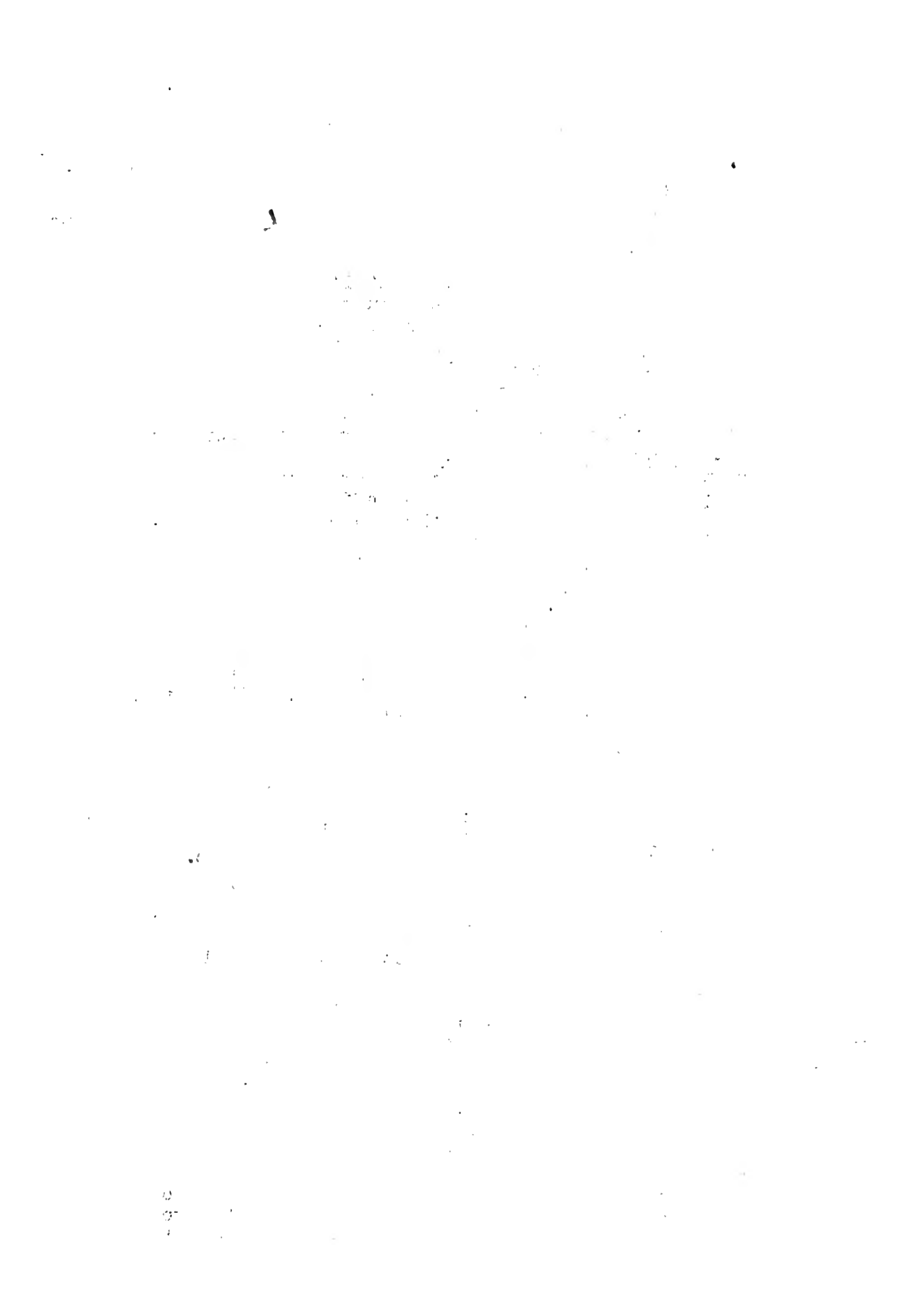
See May's Criminal Law Sec. 28.

All the states have very wisely provided punishment for an attempted suicide.

An attempt must be such an act as is approximately connected with the final illegal object. By this proposition we are distinguishing between preparation of the crime and criminal attempt. Of course, acts leading up to a crime are not punishable you must go so far in this act to come close enough as to be one step in the execution of crime.

See 30 of Ala. 380.

Now, one of the most interesting cases that has been before our courts is a Conn. case where a man was indicted for arson, and it was proved against him, but all he did was to buy some matches and kerosene oil, and he intended to set fire to the dwelling but before he got any further they arrested him.



The court held that that was simply a preparation and the Law does not punish Criminal Preparation.

,33 of Eng. Law in Equity 540.

The theory of this principle is full of difficulties and the cases are not all of the reconcilable.

Second: Where, however, the act is a step toward the Criminal Act it is unquestionable in part execution of the Criminal purpose and it is punishable as an attempt.

Take for instance the procuring of an impression of a key to another mans house or shop. You can buy keys without any wrong but when you make an impression to another man's house you are necessarily taking part execution in a Criminal Execution.

Bennett & Herd 8. Lead Cases

22 Upper Ca. Com. Pleas. 338.

Third: - I want to discuss here a proposition that has been given a good deal of trouble in the law of Attempts, - Attempts to do impossible things. As a general rule the circumstances must be such that the completed action results in doing the thing attempted, or a man cannot be punished.

8 Carrington 73 67

Fourth The attempt, however may be criminal event though the completed offence is impossible, where the criminal didn't know of the impossibility.

5 th Cushing 365

9th Allen 274.

1st of Bishop Sec. 243

In England it is held that a person cannot be guilty where the completed offence was impossible. That is the law of Eng. but it is not so in Mass.

The weight of authority is with the Mass. Doctrine.

-- oOo --

Sopt. 2 5th, 1902.



## LECTURE III

--- oOo ---

Now, at the last lecture I think I was discussing the subject of Criminal Intent, and if I remember correctly I told you about the Pick Pocket Cases.

Now how far is criminal solicitation criminal intent. Solicitation to commit a crime may be a criminal attempt even though the solicitation is refused. Solicitation to commit murder would

be a criminal attempt. Solicitation to commit secret crimes is not generally regarded as a criminal attempt. Adultery is not a criminal attempt when solicited.

1st Wharton Crim. Law 179.

27th Pickering 476

May on Crim. Law P. 25

82 of Ill 191.

Now, those cases to which I have referred you to clearly distinguish between solicitation of that involving a breach of public office and a secret crime.

Crimes must be declared by law. The state or the nation according to its jurisdiction makes its selection of those acts which will be punishable as crime, and nobody else. First of all note that the U. S. Gov. has no common Law criminal jurisdiction. There are no common law crimes against the U. S. Gov.

Second : States generally have common law criminal jurisdiction by reason of their sovereignty.

Conditions of Criminality: That I mean by this is there can be no crimes unless the condition which I propose to discuss exist I don't care how great the wrong.

Now the conditions of criminality, the more important ones at least, are as follows:

(a) Accused must have been of competent age.

(b) He must have been acting voluntarily. It must have been his act not one forced upon him.

(c) He must have sufficient mental capacity.

(d) He must have acted with Criminal Intent. That would eliminate mistake and accident.

Now, let us consider these conditions in their order.

First, infancy: A child under 7 years of age is conclusively presumed incapable of committing crime and the presumption is indisputable at the common law. A child under seven years of age cannot be convicted of a crime on his own confession.

1st of Hale's Pleas to the Crown 27

Between the ages of 7 and 14 a child is Prima Facie incapable, that is, it was not conclusive presumption, it is only a presumption that might be rebutted by positive showing that the child was guilty. There are crimes which the infant if under seven years is conclusively presumed to be unable of committing.

At the common law the proposition of a female under 10



years of age is incapable of consenting to her own dishonor. A person who violates a chastity is guilty of rape, even though she may have consented. That age has been changed by the statutes of most of the states. A male - a boy - under 14 years of age was incapable of committing rape at the common law and those were peculiar crimes, but they were crimes beyond doubt.

14 Ohio State 222.

See 4 Blackstone Com. 23

Where it appears that a girl 13 has been burned for killing her mistress. The girl was either crazy or she did not commit the crime

Compulsion to commit a crime. A unavoidable crime is a contradiction. Whatever is unavoidable is not a crime, and whatever is a crime is not unavoidable.

3 Cushing 13 Mis. 246.

Pressing necessity is no defence to a crime.

I will call attention to the Dudley Case which was one where great hardships were endured. Three men were cast away at sea. They had eaten up their food and drank all the water. One of the three was weaker than the other two and the two stronger ones came to the conclusion that if anyone was to die it would be the weaker. They therefore kill him and eat his flesh, and also drank his blood thus saving their lives until they were pick up by another vessel. They were taken to Eng. and indicted on a charge of murder. The defence was that of pressing necessity. The judge held it to be a case of murder but they were afterward granted pardon by the crown.

15 Cox Criminal Cases 624.

1 Law Quarterly Review 51

The theory is that pressing necessity does not hold beyond that of self defence, and that compulsion is no defence where the person wronged is in any way responsible for the conditions.

It is not treason for one to join the ranks of the enemy in order to save his own life.

1 st Russell 660.

Now, there is a case where compulsion is a defence to Criminality. The most prominent cases are those of Husband & Wife.

First in many crimes the wife is exempt from punishment by reason of the presumed coercion of the husband. She is presumed to be under his domination and as a general rule for a crime committed in his presence she is not regarded as responsible. The presumption however, may be rebutted if the evidence may be shown to prove it was against the husband will or wishes and that the wife was the prime factor in the crime.

55 Conn 397 38 Amer. 744?

13 Allen 560 Mass Reps.

13 R. I.

12 Mass. 287.

If you study these cases you will find this peculiar condition of things, that in prosecution for the illegal sale of intoxicating liquors. The defence of compulsion made by the wife is more common than any other crime.





I do not know of many cases where the defence, coercion has prevailed.

Second proposition under compulsion is coverture. Coverture is not a defence to all crimes. It is no defence to a charge of treason or murder. The authorities are in confusion regarding coverture as a defence in case of robbery. Some include this while others omit it. It is a defence to misdemeanors and the low crimes.

i st Greenleaf on Evidence 28.

1st of Bishop of Married Women 42

132 Mass 267.

Married women at the common law were not held responsible in many cases for crime, at the same time you are aware of the fact that our legislatures have passed laws in which a great degree of responsibility falls upon the women. In this connection you may as well note that **Married Women's Act** which pertains to her capacity and her personal responsibility does not as a rule affect the proposition upon which I have been discussing.

We will next take up the defence offered as mental incapacity.

--- oOo----

Oct. 3rd, 1902.



## LECTURE IV.

At the close of the last lecture we were discussing conditions of criminality, and we learned first that the person must be competent as to age.

Second: That the act must be done voluntarily.

We come now, to the third condition of criminality, and that is mental incapacity or frequently called INSANITY.

Insanity is a general term and includes various phases of mental derangement. It is what is known in the law as mental unsoundness, but that will hardly answer because there are too many mentally ~~unsound~~ not insane.

The typos of insanity are generally classified into two classes.

1. Totally Insanity.

2. Partial Insanity.

Totally insanity is of three kinds:

(a) Idiocy. (b) Lunacy (c) Madness.

Each one has a different meaning in the law.

First: The Idiot is a fool from his nativity and never had any leucid interests. Of course, he has no criminal responsibility.

1st Russel on Crimes 36

To show how severely he must be afflicted in order to be an idiot in England I quote the following : (Hale) "He knows how to count twenty's or tell his own age or father or mother, but if he knows his letter and can read by instructions of another he is no idiot." Of course, such a case as that rarely comes before our modern courts.

Second: A Lunatic is one afflicted with dementia only at certain periods and having intervalles of reasoning. During his frenzy, the lunatic is irresponsible for crime at other times he is responsible.

THird: Permanent dementia or madness is that condition of the mind which excludes reasoning. It is a permanent loss of mind through disease or accident. It is however, a loss of mind and such a person cannot commit a crime. He may kill a man but that killing is not murder. Their cases seldom come before our courts.

The next case of insanity is what is called partial insanity. Partial insanity is a qualified derangement of the mental faculties and comes frequently before our courts.

First partial insanity is what is known as monomania-madness from one idea - an uncontrollable impulse to commit a particular act-as to other things he may be perfectly sane.

The law does not recognize an irresponsible impulse unless it is an insane impulse-the product of a diseased mind. Partial insanity that we see paraded before our courts that is not the product of a diseased mind has no place as defence of criminal charges.



Yeilding to insane impulses or I might better say irresist-  
ible impulses.

May's Criminal Law 15.

Another form of partial insanity is what is know as Klept-  
omania, in plain English - it is an insane desire to steal.  
A person may have an insane idee to steal a particular thing and yet  
be perfectly sane upon everthing else.

10 Texas 520

2 Parker 's Criminal Reps. 243.

In the Parker case a woman had an insane desire to  
steal her friends shoes, and she was indited for larceny. The  
defnece was kleptomania. The crime must have been the result of  
mental disorder or the monomania is no defence. That is to say  
to prove one innocent of a charge on this ground the act which  
is charged against the accused must appear to have been the pro-  
duct of the monomania.

The MOTIVE for the crime is the best evidence of sanity  
where you are in doubt, and the defence of insanity is presented  
. . if you find that there was present a motive for the crime the  
accused is entitled to the presumption that he acted from sane  
rather than insane impulses. If a man acts as a sane man would  
under the same circumstances insanity is a poor defence, and it  
hardly worth while to inquire whether he had a diseased mind.

The next one of partial insanity and perhaps the most im-  
portant one is what is know as an insane delusion. Some of the  
most important cases in the history of criminal jurisprudence have  
arisen out of defence of insane delusion.

AN INSANE DELUSION is a firm belief in the existence  
of a fact which is wholly imaginary. You can easily see how a  
person from a diseased mind can firmly believe in a fact which was  
really no fact at all, and if he acted on that delusion and commit-  
ted a crime it would not be a crime.

7 Metcalf 500

1 Bennett & Herd 95

2 Lawson's Def. 158

27 Howells State Trials 122

Another one which is perhaps had some effect, at least,  
in changing the English view of Criminal Responsibility is ~~what~~ is  
known as McNaughton.

10 Federal Rep. 177 .

The Hadfield Case. This case was where Hadfield who  
had been engaged in battle with Lord Wellington at the time of  
the battle of Waterloo and he had been seriously wounded in three  
or four places. He came home and was highly respected by  
everybody, but he thought he had got to die for the world and in  
order to accomplish this he must kill Geo. the Third. He fired  
a revolver at the king which is treason and that is followed by death  
This case was a test of criminal responsibility.

Erskin Speeches.

The McNaughton case is a case where the defendant at-



tempted to kill the private secretary of Sir Robt. Peal. He was tried and acquitted on the ground of insanity. That made the house of Lords indignant and they informed the judges to submit to them questions as to what was a true test of responsibility. There were two tests: Right distinguished from wrong in general and right distinguished from wrong in a particular act. The true test was right from wrong in reference to a particular act and that is the test which is now generally recognized.

Now from this case we may draw some general conclusions.

(A) Delusion must be something more than an erroneous conclusion from disputable facts. In other words, insane delusion is never a result of false reasoning and reflection.

(B) Rational opinions regarding questions of law, politics or religion are not insane delusions. That is why Guittot was hanged.

(C) Delusion must be result of disease. It must be such that if the imaginary facts existed the act committed would be justifiable.

7 Metcalf 506.

Now, such an insane delusion as we have been discussing is a good defence to a criminal charge.

The next form of qualified insanity is what is known as irresistible impulse.

An irresistible impulse is not convertible with passionate propensities.

77 Penn 205.

At the same time you are aware that the existence of those conditions may reduce a crime from murder to manslaughter, but that is not the kind of a defence you would like to win on.

-- oOo --

October 9, 1902.





## LECTURE V.

**MORAL INSANITY.** That is another form of partial insanity. Now moral insanity is a derangement of the moral functions while the intellectual faculties remain unimpaired. The theory that man can be diseased morally and perfect sound intellectually is absurd according to my understanding, otherwise most of us might be ranked as insane.

Insanity is a product (As I have told you before) of a diseased mind and there is no such thing as moral insanity, at all events you may note it is not received as a defence to a criminal charge

41 Iowa 232

12 Crim. Law Magazine p.6

The Guitot case brought about important changes in this question and if you want to get at a discussion of this case see No. American Review for January 1882.

Some people have held or talked about moral insanity as though it was a defence to a criminal charge.

For contrary 4 of Metcalf (Kentucky) 207.

Moral insanity is nothing more than moral depravity.

**EMOTIONAL INSANITY.** This is a temporary mental disturbance arising from violent excitement of the emotions or passions. This defence has often been offered before our courts but it is now now accepted as a defence to a criminal charge.

38 Mich. 482.

The theory of the courts is this: A man has not a right to say that his emotions have run away with him. It is only when disease tackles him.

Now the question comes what is a true test of criminal responsibility.

There is first, the Wild Beast Test. Now, that was the earliest test known to the English Law. I don't know that it was ever enforced in the U. S. It is this: That a man in order to be exempt from punishment on the plea of mental depravity must be a man totally depraved of his mental capacity.

16 Howells State Trials 176.

The second test was that employed after the wild beast test passed out of existence. Test of Right and Wrong. In general that is the power to distinguish right from wrong in the abstract. Now, these two tests are abolished or overlooked by courts of Both Eng. and this country.

The Third test is one most generally applied. It is Right and Wrong Test with reference to a particular act committed.

That is the McNaughton Case.

The Fourth Test is what is known as Power of Control Test. I don't think this test has gained any foot hold so that in a controverted case it would be recognized as a test.

81 Ala 572.

It was said in that case and this was the law laid down" the accused must not have only knowledge of right and wrong but power to choose between right and wrong, or he is not responsible.



Now, some conclusions upon this subject of insanity when relied upon as defence to crime is a mixed question of law and fact

Second: It is a perfect defence to the accusation of crime if the accused at the time he committed the act was afflicted with a mental disease, which was the cause of the crime committed.

Third: When it appears that but for this mental disease the act would not have been committed that is a complete defence for the crime.

Fourth: No form of moral or emotional insanity is defence against criminal charge .

The next defence to crime is DRUNKENNESS.

1. Voluntary intoxication producing even temporary madness is no defence to a criminal charge. That is true as a general rule but I shall make some modification.

18 N. Y. 9  
17 Michigan 9

Nor does it aggregate defence.

38 Ill 815.

Now the reasons for the rule.

- a. Public Inebriety is in itself unlawful and one who indulges in it must be held for the consequences.
- b. Drunkenness may reduce crime of murder from first to second degree.

104 U. S. 631  
75 Penn. 403

For contrary 37 Mo 332.

c. Drunkenness would of itself reduce crime of murder to manslaughter. Drunkenness may be introduced in evidence of circumstance bearing on the subject, of adequate provocation ;drunkenness cannot make an adequate provocation inadequate or visa versa.

18 N. Y. p 19  
3 of Gray (Mass) 463.  
44 Penn 55.

d. When the gist of the crime is the existence of his specific intent drunkenness may be complete defence because it precludes formation of such specific intent.

19 Mich. 401  
2 Lee (Tenn) 401  
61 Iowa 369

Drunkenness is complete defence of burglary, also, assault with intent to rape where the rape was not carried out.

47 Michigan 334.

It is also, a good defence for the passing of counterfeit money.

14 Ohio 555.

It is said to be a good defence for voting twice at an election.

29 Cal 678.

Contrary 21 Minn 22.

e. As a general rule evidence of drunkenness of the accused is received in evidence as part of the res gesta.

6 Parker Criminal Cases 209.



2. Involuntary drunkenness produced through the fraud of another may be a complete defence to crime.

104 Ill. 605.

3. An organic mental disease such as delirium even though occasioned by excessive drinking: if it overthrows the sense of right and wrong is a good defence.

CRIMINAL INTENT. Of course, all we have been stating regarding age, mental capacity etc., bear upon criminal intent, but criminal intent is a criminal purpose or resolve.

97 Mass. 567.

This must be distinguished from belief and motive.

Criminal intent is either particular or general.

There must be what is called a guilty mind or there is no crime such as is produced by general criminal intent.

Second. From the commission of the completed offence the general intent to produce the result is presumed.

Malevolence in such a case amounts to criminal intent. Because how are you going to tell what a man's intentions are when he says one thing and does another.

(a) General malevolence or wickedness may be no more than carelessness or negligence and yet be criminal. For example: One may be convicted of manslaughter who makes reckless use of fire arms whereby one is killed.

2 C & K. (Eng.) 230.

3. There are crimes at the common law and in the statutes which call for a particular intent. Now, in such cases the responsibility of that particular intent is essential to the crime. No other intent however wicked can take its place, and the intent must be proved.

19 Mich. 401

The most common of particular intent is assault.

33 Mich. 300

--- oOo ---

October 10th, 1902.



## L E C T U R E VI.

## CRIMINAL MISTAKE AND IGNORANCE OF LAW AND FACT:

Of course, you can easily see that a mistake of fact or ignorance of law may involve the question as to whether or not, wrong done was with any criminal intent.

(a) Ignorance of the law excuses no man, is fundamental and applies to the law of crimes. However honestly one may believe that a statute he violates was unconstitutional is no defence or excuse for his violation of the statute.

98 U. S. 145.

This is the Mormon case wherethey believed that the statute against Mormons or Mormonism was not according to the constitution of the U. S., and therefore, even though they made a mistake they ought not to be punished for they had not criminal intent. The supreme court held that they were responsible.

103 U. S. 304

Advice of council that statutes are unconstitutional is no excuse.

11 Blatchford U. S. 200

57 Barbour 625

The Blatchford case was that of Susan B. Anthony.

Proof of advice of council may however, be received to show that the act was not willful.

9 Metcalf 238

3 McLean 573

Mistake of fact producing untrue conclusion, as one's legal rights, may deprive an act of criminality. The mistake of law is as a rule no defence.

One cannot be convicted of larceny who takes goods of another with bona fide claim of rights. In other words, what a person does, in claim of right which the jury find is bona fide will not amount to a criminal act.

36 Michigan 306

1st Cushing 5

23 Queen's Bench Div. 168.

After seven years absence, a man is supposed to be dead and his estate may be administered upon by the statutes of most states.

Suppose that a woman has lost her husband and he has not been heard of for seven years, can she marry without being indicted of bigamy?

In the last named case the holding was that if the husband had been absent for seven years they wife might marry and the husband was bona fide believed to be dead.

Contrary 7 Metcalf 472.

11 Allen 23

1st Bishop 303 Note A





A Minor it has been held cannot be convicted of unlawfully voting when it was by mistake of his age.

23 Ala. 3078

One whose wrongful act signs another's name to a note believing he has authority cannot be convicted of perjury.

7 Carrington p. 204.

As a general principle there can be no crime where there is no Criminal Intent.

In statutory crimes there may be a crime irrespective of any criminal intent. In other words in statutory crimes there may be a man punished of criminality when there is utter ignorance of fact.

39 Michigan 200

Contrary 52 Mich. 579

108 Mass 441

97 Mass 567

When a man violates police regulations he violates them at his peril.

Contrary to above 48 Ind. 289.

55 Ala 16.

Felony at the Common Law, criminal intent is an essential ingredient and ignorance of fact or law that shows that there was no criminal intent is a complete defence, but in the minor statutory cases ignorance of fact is no excuse.

#### CONCLUSIONS OF IGNORANCE OF FACT:

(a) When from the law it appears that the evil intent is an essential ingredient then ignorance of fact is a defence, because if evil intent is essential ingredient then evidence of fact shows no evil intent.

(b) Where a statute makes an act indictable irrespective of guilty knowledge that ignorance of fact is no excuse.

(c) The question whether criminal intent is an essential ingredient of a crime is a legislative question.

(d) When the state inflicts a punishment for knowingly committing an act then guilty knowledge is an essential ingredient of the crime.

15 Grey 195

30 Ohio 264

(E) In the higher offences (and this is the law of Judge Cooley) the commission of which may involve sacrifice of life or personal liberty, as a general rule, criminal intent is an essential and ignorance of fact is an excuse, as against those higher crimes but in the lower penal offences arising from violation of police regulations guilty knowledge is not generally required. They punish the act they do not inquire into intent.

Now, this whole subject is somewhat ably discussed in  
13 Criminal Law Mag. 839.

October 17, 1902.



## LECTURE VII.

---oCo---

At the close of the last lecture we were discussing the subject of Criminal Intent. We had called your attention to the fact that there might be crime without any criminal intent, particularly where the person was punished for the violation of sanitary and police regulations, but at the common law criminal intent was an essential ingredient of the crime.

We will take up the subject of two or more intents, that is an act committed where the perpetrator of the act had in mind two or more intents, either one of which was criminal. Now there are some crimes where two or more intents are essential or the crime has not been committed. Larceny is never committed except when there has been two intents--one of trespass, and the other is the intent to steal or to convert the property to the use of the wrong doer. These two points must concur in point of time. The same is true in the crime of burglary. There must be the intent of trespass and the intent to commit a felony.

Where a double intent exists (Where there is a double intent and each one involves an indictable offense.)

Suppose a person administers poison for the accomplishment of the crime of seduction or rape-- 1-The criminal intent of administering the poison and 2-The crime of seduction or rape. The prosecution may indict on either offense.

6 Mich., 15

1 Carrington & Paine 658.

We will now take up another part of the law of intent and that is what is known as the unintended results. As a general rule if a man means one thing and does another he is responsible for the wrong done. A man who commits a crime will not, as a general rule, be permitted to say I intended another.

1 Bishop 327

Where one intends to commit a crime, but by accident or mistake an unintended result follows, the law transfers the unlawful intent to the result. (Bishop says by way of magic) Now if A fires at B, intending to kill B, and misses his mark and kills C, he is guilty of the murder of C.

35 Eng. Law & Equity, 567

You can easily see that there would be no safety in the law if that kind of an excuse were permitted.



VII

---oOo---

## See II East Pleas of the Crown

The defendant in this case intended to commit the crime of rape. Evidence showed clearly that he intended to rape the prosecutor in the case. The woman paid him a sum of money to desist. He was prosecuted for robbery.

One is not relieved of criminal responsibility because the act is far in excess of what he intended.

5 Mich 10

If A says to B I will give you \$25.00 if you will give C a good licking; B accepts the proposition and does perform his duty, but to excess and to such an extent that he kills the party assailed. He is guilty of murder.

The act intended need not be criminal, but it must be mala in se not merely malum prohibitum.

1 Bishop 351

Now I have said that where a man intends one wrong and does another he is responsible for the wrong done. That is not true where the particular intent is the gist of the crime.

55 59 Ala. 1

At the common law a man had the right to set spring guns to protect his house. There is legislation against such a practice now in many states. Another practice was that of setting dog spears in the ground so that if dogs went chasing hares on ground reserved for game the dog would probably catch a spear instead of the hare.

69 Me 103

A wrong doer is responsible criminally for the natural consequences of his act but not for the possible consequences.

30 Mich 505

7 Allen 341 (Mass)

Now circumstances may show that the injury (homicide for instance) was purely accidental.

The Levitt case found in Cook's cases 533 is very interesting. Was where a servant had her lady companion in the house with her, and upon hearing a noise about the house got frightened and called to the family up stairs. The lady friend was forbidden by the family to be in their house and she was hid in the closet by the servant girl. The wife discovered a noise in the closet and cried out "here are they who would undo us" at this moment the husband appeared and killed the girl in the closet. He was indicted for murder. The courts held that under the circumstances he was not guilty of any crime whatsoever, not even manslaughter.



We now come to another ingredient, and the last one, in conditions of criminality and that is MALICE. This is an important element in crime. The question arises at once - What is it? There may be a line without motive and on the other hand there are many offenses which are punished only when malice is present. Murder in the first degree is not a crime unless committed maliciously. Malice is that state of the mind which permits one to the commission of an unlawful act without legal justification. Malice involves a mental state. It is different from intent. It involves a wickedness.

71 Mich. 267

It is on the whole a wicked intent to do a wrong.

64 Mich. 205 It is the wicked frame of mind that the law punishes.

34 N.H. 410

Malice is generally given us of two kinds in the law but I shall give you three:

- 1-Express malice, (Shown by words and conduct.)
- 2-Implied malice, (What may be implied from the circumstances of the act committed.)
- 3-Malice aforethought, (This is the ingredient that distinguishes murder from manslaughter.)

35 Mich. 16

There may be anger, hatred and revenge without legal malice aforethought.

#### PARTIES TO CRIME:

The party accused must be a natural person. A corporation which is entirely an artificial person cannot be guilty of a crime, but criminal proceedings may be brought against a corporation. Crime belongs to the substantive law and criminal procedure to the adjective law.

1 Bishop Sec 417

The parties to crime are either 1-Principal, or 2-accessories. The principal is the one who is actually or constructively present at the time the crime is committed and adds in its execution. A principal in the first degree is he who is the actor and perpetrator of the deed. His actual presence is not necessary for there are crimes in which his actual presence is not necessary. If he acts through a guilty agent he is not principal in the first degree.

5 Parker's Crim. Acts 120  
30 Georgia 757.

Oct. 25-1902

--o--o--o--o--o--o--o--o--





Now, in the case of the last lecture, I think I was discussing Principals to crime. I had discussed what we call the principal in the first degree. I now take up the principal in the second degree.

The Principal in the second degree is one who is present aiding and abetting the crime. The real distinction between principal in the first degree and principal in the second degree is that the one is the actor and the other is the immediate assistant. He must be constructively but not actually present. Now this distinction between principal in the first degree and principal in the second degree is of value only in a scientific standpoint. It is not of any great practical value because the punishment for the principal in the first degree and the principal in the second degree is uniformly the same.

The test to determine whether one is a principal or an accessory is whether he is so near as to render his help if necessary.

9 Pickering 496

Where one watches for the purpose of giving information in case of danger of detection he is principal in the second degree and not an accessory.

26 Ind. 495

Or when one detains another (say the owner of the property) while the other steals it. see:

10 Ohio State 146

To the contrary, however, of that proposition of detaining the owner of property see:

III Cox's Crim. Cases 85

In this case the defendant unlocked the door and went away, another came and stole the goods. I think that the defendant that went away took the view of the goods out of sight so that he would not be too near when the theft was committed. It was held that the defendant was not a principal in the second degree but was an accessory.

9 Pickering 496

10 " 477

10 " 497

Read the murder of Capt. Joseph White found in Vol VI of Webster's speeches 41.

Accessories are those who are not present actually or constructively at the time the act was committed. All principals in the first or second degrees must be present actually or constructively. Accessories are concerned in the crime and its commission before or after the fact but they are not present actually or constructively.



VIII The distinction between principals in a crime and accessories is chiefly important in procedure.

An accessory before the fact is one whose will contributes to the felony committed by another's principal, while himself is too far away to be of any assistance.

1 Bishop Sec. 675

As a general rule one who commands counsel or procures the commission of a felony is called an accessory before the ~~fact~~ fact.

There are some offenses that do not admit of accessories: There can be no accessories before the fact to the crime of high treason, all participants are regarded as principals. It is said also that there can be no accessories before the fact to the crime of man slaughter.

40 Eng. Law & Equity 556

There may be accessories after the fact in man slaughter but not before the fact. In misdemeanors all engaged in the commission of the offense are principals and not accessories. In other words, there are no accessories in the lighter offenses.

12 Ohio State 214

1 Bishop 636

It is sometimes said that petit larceny does not admit of accessories even though it be a felony by statute.

3 Will N.Y. 395

An accessory is criminally responsible for all the probable consequences of the unlawful act committed.

40 Minn 77

If the principal commits another and distinct offense not contemplated in the original design the accessory is not responsible.

96 Ill 73

26 Mich 112

Accessory after the Fact is one who knowing that a felony has been committed, aids the felon to escape punishment. It is necessary, (a) that the accessory should ~~be~~ have notice that the felon he assists has committed a felony, and the felon must have been fully completed, (b) It is necessary that the assistance given should be given in order to prevent the felons apprehension to ~~xxxxxx~~ or trial or punishment. So you see there are various steps where one may step in as accessory after the fact. Rendering assistance to a felon by giving him something to eat or a place to sleep, even you know the felon has been committed, does not make one guilty as accessory, but you let him



have a horse to run away with and you will be counted as an accessory after the fact. Neglecting to prosecute a felon or suffering him to escape does not make one an accessory after the fact. There must be, in other words, some personal assistance rendered the felon as by concealing him or furnishing him means of escape. Now compounding a felony or misprision of felony are not such acts as render one an accessory after the fact. The practical value between these is, 1-At the common law an accessory before the fact in one county (Washington) to a crime committed in another county (Maine) could not be convicted in either county. That is not the rule now.

Clark's Crim. Procedure 16

2-The accessory after the fact in rendering assistance may commit a substantive offense, that is, an independent offense. 3-Where one aids a felon by effecting his rescue or escape (as giving a saw to a jail breaker) he is both, an accessory after the fact and is also guilty of jail breaking.

1 Liskay 597

45 Indiana 433

4-A wife cannot be an accessory after the fact to her husband as principal. (It is said to be on the theory that it is the duty of the wife to protect the husband.) A husband may be an accessory after the fact to his wife as principal.

Herrie's Crim. Law 40

1 Clark's Crim. Law 37

Accomplices include all who participate in a crime as principal in the first or second degree; or as accessories before or after the fact. 111 Mass 347

At the common law an accessory before or after the fact could be tried with his principal or after the principal is conviction, but not before.. 44 Ind 214

43 Ohio State 432.

At the common law, if by reason of death or escape, the principal was not sentenced the accessory could never be tried.

1 Liskay 608

This has been modified by statute in most all of the states. It is no excuse for a criminal charge to say that he was commanded to do it by his principal or his master. A master may show that what is done by his servant was done against his commanding and wishes. On that subject see:

4 Gray (Mass) 16

14 Gray " 14

Oct. 24-1902.



# CRIMINAL LAW

IX

## LECTURE IX

24

---oOo---

At the last lecture we had discussed parties to crime, principals and accessories, and had made some remarks about master and servant.

We will now take up the classification of crimes, in other words how crimes are classified. The mere classification of crime at the common law was based upon their moral turpitude. There is just one classification that has been recognized for over two centuries and that is:

- 1-Treason,
- 2-Felony,
- 3-Misdemeanor.

I-At the common law Treason was not distinctly defined. Parliament from time to time enumerated acts to be known as treason and punished them with death. There were about 160 offenses that were known as treasonable offenses in Blackstone's time. There is no common law treason in the United States, there is political treason, but no common law treason. The United States constitution has defined what treason against the government is, and each state has also defined what treason against the state is.

II-A felony at the common law was such a crime as was punishable by forfeiture of the felons estate. This does not help us very much because there is no crime in the United States that permits a forfeiture. A felony at the common law was usually but not always punishable with death. A good many of the states have given a definition of the term felony while other states have not.

(a) Offenses punishable by death or imprisonment in the states prison are usually regarded as felonies. The ignominy of being confined in a state prison is sufficient to brand the offense with the term felony and the man who commits it is called a felon.

10 Mich 169

(b) Where the statute is silent on the subject the common law is appealed to and as a general rule what was a felony at the common law is regarded as a felony in the United States, even though the punishment may be different.

III-A misprision is any crime less than a felony. Sometimes it is said that the term crime cannot be properly applied to misprision.

1. *Chlorophyll a* (Chl *a*)

— 2 —

1000 1000 1000

10

•



A misdemeanor is punishable by jail sentence. Where the lowest degree of punishment that can be inflicted is state prison it is a felony; and where the highest degree of punishment that can be inflicted is fine or jail sentence it is a misdemeanor.

SPECIFIC CRIMES.

We have finished the general parts that we started out to discuss and we will now take up the specific crimes which rest upon these general parts: Note the following classification of crimes:

- 1-Offenses against Sovereignty,
- 2-Offenses against persons,
- 3-Offenses against property,
- 4-Offenses against public justice,
- 5-Offenses against public peace,
- 6-Offenses against morals and religion.

We shall discuss during the remainder of the semester the crimes in this order.

Offenses Against The Sovereignty:

There are offenses against the law of nations such as piracy, etc, that we shall not consider.

- 1-Treason,
- 2-Misprision,
- 3-Sedition.

Treason is the highest crime known to the law. It involves criminal renunciation of allegiance to the sovereign power, but that renunciation must be displayed in a certain way or it is not treason. At the common law treason was divided into, a-High treason and, b-Petit treason. You have frequently heard the expression "Guilty of High Treason." In this country all treason is high treason. We have no petit treason. Petit treason was a breach of domestic faith, and it no longer exists in England or this country.

Blackstone enumerates seven different kinds of high treason, but we have only two kinds of high treason and they are enumerated by the constitution of the United States:

- (a) Levying war against the United States,
- (b) Adhering to their enemies and giving them aid and comfort.

It is also required by the constitution of the United States that there must be two witnesses to some overt act or confession in open court.

What is levying war? The term is not easily defined.



It is resistance to the sovereign state, through force of arms, by a body of men assembled for the purpose of executing treasonable design. That definition comes from the celebrated Aaron Burr case, which never reached the supreme court of the United States.

II Dallas Fed. Rep. Cases

I Payne 265

IV Cranch U.S. Sup. Court 65

I & II Causa Celebrae (Trial of Aaron Burr)

II Wallace Jr. 200

The subject of treason against the state has never come before any state court as I know of.

The cases in II Dallas in 1794 are cases which arose out of an insurrection in Va over moonshiners who were bound to make liquor in the mountains without paying taxes to the government. The U.S. troops went to enforce the law and they were met with armed resistance. Quite a number of persons on both sides were killed. They were tried in the lower federal court and all found guilty of treason, but before it ever got to the Supreme Court the President pardoned them all and that was the last known of these cases.

Aaron Burr was one of the brightest lawyers that was in New York City and you will remember that he killed Alexander Hamilton in a dual. But he set out on another mission and I have not the slightest doubt in my mind but that it was his intention to subvert the government. He with several other prominent men attempted to purchase territory in ~~East~~ Louisiana, and was going to start up a little republic of his own. While he was in Louisiana laying his plans they were gathering together an army of men and ammunition on an island near the head of the Ohio river. The government became aware of his undertakings and proceeded to arrest him. His arrest and the experiences he had in being taken from Louisiana down through Alabama and up to the District of Columbia where he was tried is richer than any novel that I have ever read. He was tried there on the charge of Treason. The question became a political one and Burr had numerous friends. The historical discussion can be found in the two volumes I referred you to and is very interesting indeed.

From the above cases we draw the following conclusions:

(a) A conspiracy to levy war or subvert the government by force of arms is not treason. (For you see it is not the conspiracy of levying war but the actual levying. There must be, in other words, an actual assembly of men for the purpose of executing a treasonable design.



(b) A treasonable design is not sufficient. There must be some overt act in execution of that design. ( In that Aaron Burr case there was the gathering together of men with arms and ammunition, but there was no overt act.)

(c) A distinction between a treasonable and a riotous assemblage of men is in the intent. If the object to be accomplished is of a public nature and looks to overthrow the government it is Treason. I mean a direct attempt to overthrow the government, that is, to put the President out and put somebody else in. Armed resistance to the law is not Treason. That is enough on the subject of levying war.

There is another kind of Treason under the constitution and that is - Adhering to the enemies and giving them aid and comfort. This means active assistance. Words are not sufficient to make a man a traitor. You must give the enemy aid and comfort in some substantial way. The enemies must be foreign enemies and not merely rebel subjects.

II Abbot U.S. 364

May's crim. Law 212

During the civil war giving aid and comfort to them was only giving aid and comfort to rebel subjects and not foreign enemies.

The state constitutions provide for treason against the state and enemies of the United States are not enemies against the state.

11 Johnson 549

Misprision of Treason.

Misprision of Treason is the concealment of felons or the failure to make it known to the government by one having knowledge of the facts. As a general rule a person may know that a crime has been committed and he may keep still about it and say nothing without being guilty of anything, but that is not true in treason. Misprision is the offense of knowing that treason has been committed and saying nothing about it. In Misprision the ordinary rules of evidence except in regard to the two witnesses. The rule of evidence that there must be two witnesses for the same overt act does not apply to Misprision of Treason.

SEDITION:

At the common law sedition was the unlawful disturbance tranquility of the state by insurrection or movement not amounting to treason. Sedition at the common law was punished very severely. It was sometimes worse to say something wrong against the government than to do something wrong.

October 30-1902.

---o---o---o---o---



---oOo---

At the last lecture we said all that we had to say with reference to offenses against the Sovereignty. I have now come to the next sub-division which are:

#### OFFENSES AGAINST THE PERSON:

This subject comes closer home and will occupy our time for several lectures. The greatest offense against the person is involved in Criminal Homicide.

HOMICIDE is the killing of a human being, and it may be felonious or it may not be. It is of three kinds:

- 1-Felonious Homicide,
- 2-Excusable Homicide,
- 3-Justifiable Homicide.

Thus three kinds are recognized by all the Jurists at the present time. Bracton gave 12 different kinds of homicide but 3 is enough for us.

Felonious Homicide is the unlawful killing of a human Being. Of course in discussing homicide I assume that all the conditions of criminality, which we have been discussing, exist. Because unless they do exist there would be no felonious homicide.

An insane person cannot be guilty of homicide. There are certain propositions with reference to homicide that I must discuss before taking up the two or three different kinds.

1-There must be clear proof of Corpus Delicti. (That term meaning nothing more than the body of the wrong and is a term that is applied almost exclusively to felonious homicide, but it is true in larceny. Before you can convict a man of being a thief you must prove that something has been stolen and not lost. The first thing to prove in a felonious homicide is the corpus delicti. This, of course, involves the proving of an overt act executed through criminal agencies. One should not be convicted of homicide until the fact has been proved that a homicide has been committed or at least the body has been found dead. Some courts hold that the body must be found before one can be convicted, especially in the states where hanging is the penalty.

II Hale's Pleas of the Crown 290

18 N.Y. 179

Now in this New York case the defendant was charged with murdering his child. The child and mother had been missing for a long time, and under suspicious circumstances. There was no evidence of the killing, and they could not find either one





of them. Everybody was certain that the accused had killed and disposed of both of them. It was held that he could not be convicted, nor can a man be convicted without clear proof of the corpus Delicti upon his own confession.

5 Mo. 526

2-There must be the killing of a person in being in order that a homicide may be felonious. This applies only to those cases where there has been the killing of an unborn child. The child, it is said, is not in being in the sense of the law until it is free from its mother's body. The e may be an abortion punished criminally but it is not murder until it is free from its mother's body.

43 Iowa 519

3-That death must take place within a year and a day from the inflicting of the wound. I think this is true in every state in the union. If a man was assaulted the accused might be guilty of ~~an~~ assault with intent to murder, but if he is convicted of murder the party assaulted must die within a year and a day from the day of assault and the day on which the injury is inflicted is reckoned as the first day of the crime. The murder was not completed until the man had died. Death is no part to the crime because it is no crime to die, and the day the injury is inflicted is the day the crime is inflicted.

6 Calif. 637

4-The injury must be the cause of the death and we mean by that Causa Causantis. In the law of Torts your attention will, o. has been called to the subject of proximate and remote cause. That does not apply in Criminal Law except to a limited extent. It is enough if the wound that was inflicted was the cause of the cause.

(a) Where a wound dangerous to life has been inflicted and death follows, it is no defense that the deceased did not take care of himself.

44 Conn 537

And it is no defense that the deceased did not submit to a surgical operation.

11 Meade & Ryan (Eng) 351

It is no defense that the immediate cause of his death was the neglectfulness of his physician.

39 Mich 236

In this last case the theory was that the accused had been killed by his physician and that before he had an opportunity to die from the wound inflicted by the accused the physician came along and put an end to his life, but it was no defense.



There are cases, however, that have held differently where the deceased came to his death through the intervention of other causes such as the neglectfulness of his physician:

10 Bush (Ky) 495

" Allen            133

15 Cox' Crim. 174

(b) Where a serious wound, though not fatal and apparently not dangerous to human life, is inflicted and death follows as the result of negligent treatment the accused is guilty of felonious homicide.

28 Ark.    155

This is a case that I regard as a very extreme case. The deceased had been slit in the left side of the abdomen with a knife cutting a gash a few inches long, but not very deep. It was apparently not dangerous, but he was a very filthy man and the filth was such that gangrene resulted from his neglect to take proper care of his wounds. The inflammation and gangrene resulted in peritonitis, and the Court held that the man who made the slash in the side could not make that an excuse and was guilty of felonious homicide. The better rule in my judgment is in the responsibility of the accused and does not depend on whether the wound inflicted was apparently dangerous to human life or not. The question is ) Was the wound inflicted with felonious intent?

50 Jones (N.C.) 420

We come now to consider several kinds of felonious homicides and there are two kinds:

1-Murder,

2-Manslaughter

Murder is a very difficult term to define. Now what was murder in one century was not in another, and what was not murder in one century is murder in the next. Murder in the early common law involved a secret killing. The present idea is that the killing must be with malice aforethought. A definition given at, 5 Cushing 289 that murder is the unlawful killing of a human being with malice aforethought express or implied.

(a) Malice aforethought involves premeditation. The term of course defines itself.

(b) There need be no direct evidence of malice aforethought but the fact of its existence may be implied from the circumstances.

The state has the burden of proof, not only that the killing was felonious, but that it was a malicious killing, and



if it fails in either the accused cannot be convicted.

53 N.Y. 164

9 Metcalf 93

(d) Malice aforethought does not require any considerable lapse of time between the intent and the act.

43 Calif. 314

You are all familiar with the fact that we have murder in the first and second degrees. What is the difference between these degrees? There were no degrees at the common law, it was either murder or manslaughter. By the statutes of most states, however, murder is divided into first and second degrees. The origin of this division is in Pennsylvania.

Murder in the first degree is murder perpetrated by means of poison, lying in wait or by any other kind of wilful, deliberate and premeditated killing or in an attempt to commit Arson, Rape, Robbery or Burglary. Now every state in the Union has these two kinds of murder; Those which are premeditated and those which are committed while attempting to perpetrate some other high crime. All other kinds of murder are murder in the second degree. As a matter of fact in the trial when the question is submitted to the jury where there are two degrees they will make it first or second according to the enormity of the crime before them and not by any such technical rule as the Court may lay down.

Punishment for murder in Michigan and some of the other states, in the first degree is imprisonment for life; and for the second degree is imprisonment for life or any number of years. In some states, however, the punishment to be inflicted is left to the jury. That is true in Illinois.

1-A specific intent to take life is not essential to murder in the first degree.

2-In deliberate and premeditated murder the intent to take life is essential. It is the distinguishing characteristic for that class of cases.

8 Wright (Penn) 55

11 Bishop Sec. 728

3-It is not necessary that the indictment should charge the degree of murder, that is whether it is murder in the first or second degree, but it is necessary that the verdict of the jury should specify the degree.

3 Ohio State 39

October 31-1902.



---oOo---

Now when we closed the last lecture we were considering the crime of murder. We will take up now some specific cases of murder. As for example, dueling.

A duel is a fight together of two persons by previous consent and with deadly weapons to settle some antecedent cause or quarrel. This definition is important because in many states all that is forbidden is duelling. Of course two persons might fight together with deadly weapons without any antecedent quarrel but that is not a duel. If one of the persons is killed all persons, including second and surgeons are guilty of murder. And of course it is murder in the first degree.

24 Bratton (Va) reports 624

A challenge to dual was a mis demeanor at the common law, even though the duel did not take place.

6 East Reports 464

The reason why it was punishable at the common law is because the challenge itself was a breach of the peace. A challenge in any state to fight a duel in another is indictable in the state where the challenge is made or delivered. If A challenges B in the state of N.C. to go over into the state of S.C. to fight it out in a duel, the duelling would be an offense against the state of S.C. and not against the state of N.C. but the issuing of the challenge would be an indictable misdemeanor in the state where the challenge is delivered.

I Hawks 487

12 Ala. 276

We come now to another specific case of murder and that is SUICIDE. That of course, is nothing more than self murder. It was a felony at the common law. You can easily see that you cannot punish the man very much but the offense was punishable for the state forfeited his personal estate. And in addition to that he was buried in a posthumous ignomy - he was buried at the cross-roads with a stake running through him. If it proved at the investigation to the satisfaction of the jury that he who killed himself was insane, the goods were not forfeited and the ignominy was not inflicted. One advising a suicide which is committed in his presence is guilty as principal. He is guilty of murder.

105 Mass 162

But if the person who advised the suicide was absent at the time the suicide was committed, even though he advised it, he





cannot be convicted at all for he is no more than an accessory before the fact.

#### IX Carrington & Payne 79

Attempt to commit suicide is usually punished by statutes. There of course you can reach the door.

MANSLAUGHTER is the next crime of importance against the person. Manslaughter and murder are distinguished from each other by the criminal ingredient of malice. Manslaughter is unlawful homicide without malice. Now manslaughter is divided into degrees in some states (i.e. first, second and third) but not so as a rule. At the common law manslaughter was divided into two classes, (a) Voluntary and (b) Involuntary and we will take up Voluntary Manslaughter. This involves an intent to kill but under such circumstances as repel the presumption of malice.

43 Cal. 436

That is, where one's life is taken with great excitement or in an affray.

Involuntary Manslaughter rests where death is caused by an unlawful act without any intent to kill. (Do not make the mistake of getting the idea that an intent to kill is always murder. That is not always so.) Manslaughter is distinguished from murder in that there is no malice in manslaughter, but there are certain circumstances attending nearly every actual case which tends to classify the crime. We will now consider some of these circumstances.

Adequate provocation reduces the crime from murder to manslaughter. This of course is on the theory that the act is the result of passion rather than that of malice.

35 Mich 16

You see this adequate provocation does not excuse the crime, it only mitigates it. Death resulting from a sudden affray or a mutual combat is manslaughter.

14 Cox Crim. Cases 1

108 Mass. 458

Take for example - Suppose that one finds another in the act of adultery with his wife and he shoots him, he is guilty not of murder but of manslaughter. If one find another attempting to rape his wife or child and kills him he is guilty of nothing.

II Bishop 708

#### PROVOCATION:

(a) The provocation must be adequate. Insulting words are not sufficient to reduce the crime of murder to manslaughter.

V Cushing 295

Blows are held to be sufficient to reduce the crime.



Simple trespassing on property is not sufficient. No man has a right to shoot another because he is trespassing on his property.  
45 Vt. 308

As a matter of fact the circumstances of each case must control under the general principals of law. The case that discusses provocation more thoroughly than others is:

10 Mich. 212

It is sometimes said that resisting illegal arrest with the extent of taking life is no more than manslaughter.

12 Cushing 246

Mays crim. law 147

The three things to be considered are 1-Provocation, 2-Malice and, 3-Cooling time.

(b) The correct test as to the adequacy of provocation is - "Was it such as would among ordinary men excite passion beyond control?" If a man cannot control his passions he must take the consequences.

1 Bishop 710

The adequacy of reasonableness of provocation is a question for the jury, but it is for the Court to give the jury the rules of law which they are expected to follow.

10 Mich. 212

(c) Provocation cannot become a cloak to cover express malice. So you see in every case you are apt to be confronted with this proposition. The defendant will show great provocation for committing the act, but the prosecutor may show facts and circumstances that the man was one bundle of express malice.

37 Mo. 406

The unnecessary use of a deadly weapon to repel an assault is murder and not manslaughter.

VII Carrington & Payne 317

33 Mich. 735

(d) Cooling Time. That expression is a legal term and is a part of the law of crime just as much as murder is. It means that if the passions had time to cool (subside) the provocation does not mitigate the crime. Many cases of provocation have fallen to the ground because there was too much cooling time. In other word, the homicide must follow close onto the heels of provocation or the offense is murder and not manslaughter. There is no stated time, but there are some tests. However, the question is one for the jury to determine from all the circumstances.

18 Mich. 212.

Under some circumstances an hour has said to be sufficient. The real test, gentlemen in my judgment, is this - "Has the mind been diverted so that the reason could assume control?"



Bishop says that the sufficiency of killing and the sufficiency of provocation are respectively questions of law and not of fact. Well gentle men I have told you to the contrary and I don't believe that I will change it.

II Bishop 711

Of course there must be cases where the courts will pass upon it at once. If the provocation is as a matter of law inadequate, it is the duty of the court to tell the jury so.

#### INVOLUNTARY MANSLAUGHTER:

Of course in involuntary manslaughter there is no question of provocation or malice. One who while committing an unlawful act (malum in se) kills another without intending to kill is guilty of involuntary manslaughter.

12 Cox' Crim. Cases 530

14 " " " 1

In the first case above mentioned is found a most remarkable case. The defendant struck a severe blow at a woman, who had in her arms a baby. The blow frightened the baby and resulted in its death. He was held guilty of manslaughter.

One who occasions the death of another through negligence may be guilty of manslaughter, though he did not intend to kill or do bodily harm. This is the most common cause of manslaughter.

I Hawkin's Pleas of the Crown c 31

Gross carelessness of a physician resulting in death will render him liable criminally.

10 Cox' Crim. Cases 525

I Bishop 633

One is guilty of involuntary manslaughter when he kills another by negligent use of fire arms.

47 Iowa 647

When one negligently runs over another he is guilty of involuntary manslaughter. One who rides a bicycle over another, killing him, is guilty of involuntary manslaughter.

11 Cox' Crim Cases 102

It is said that even a practical joke may become a crime.

III Lewin Crim. Cases 217

Now these cases are cases of negligent misfeasance. I shall take up tomorrow cases of nonfeasance resulting in manslaughter.

November 6-1902.



---oOo---

We were on the subject of manslaughter. We had discussed voluntary manslaughter and about concluded the subject of involuntary manslaughter.

Involuntary manslaughter may arise from misfeasance or nonfeasance. We discussed involuntary manslaughter arising from misfeasance and where one does an unlawful act without intending to kill anybody and kills him. Now we come to the subject of nonfeasance in manslaughter.

Now the negligent omission of an act may amount to manslaughter if the death of the party wronged follows.

31 Carr & Kern 123

32 N.J. L. 169

This was the case wherein an engineer in charge of a train allowed his engine to be handled by an inexperienced person and through this an accident happened, which resulted in the death of a person. The engineer was indicted for manslaughter. The only evidence was that he left his engine in charge of an inexperienced person, and the Court held that the conviction was proper.

If one neglects a person, such as a parent neglecting to furnish proper food or clothing for his child, he is indictable for manslaughter, providing death follows.

X Cox' Crim. Cases 530

This is one of the Christian Science Cases in which the defendant neglected to call in medical assistance on the belief that the Lord would heal the sick.

XIII Cox' Crim Cases 111

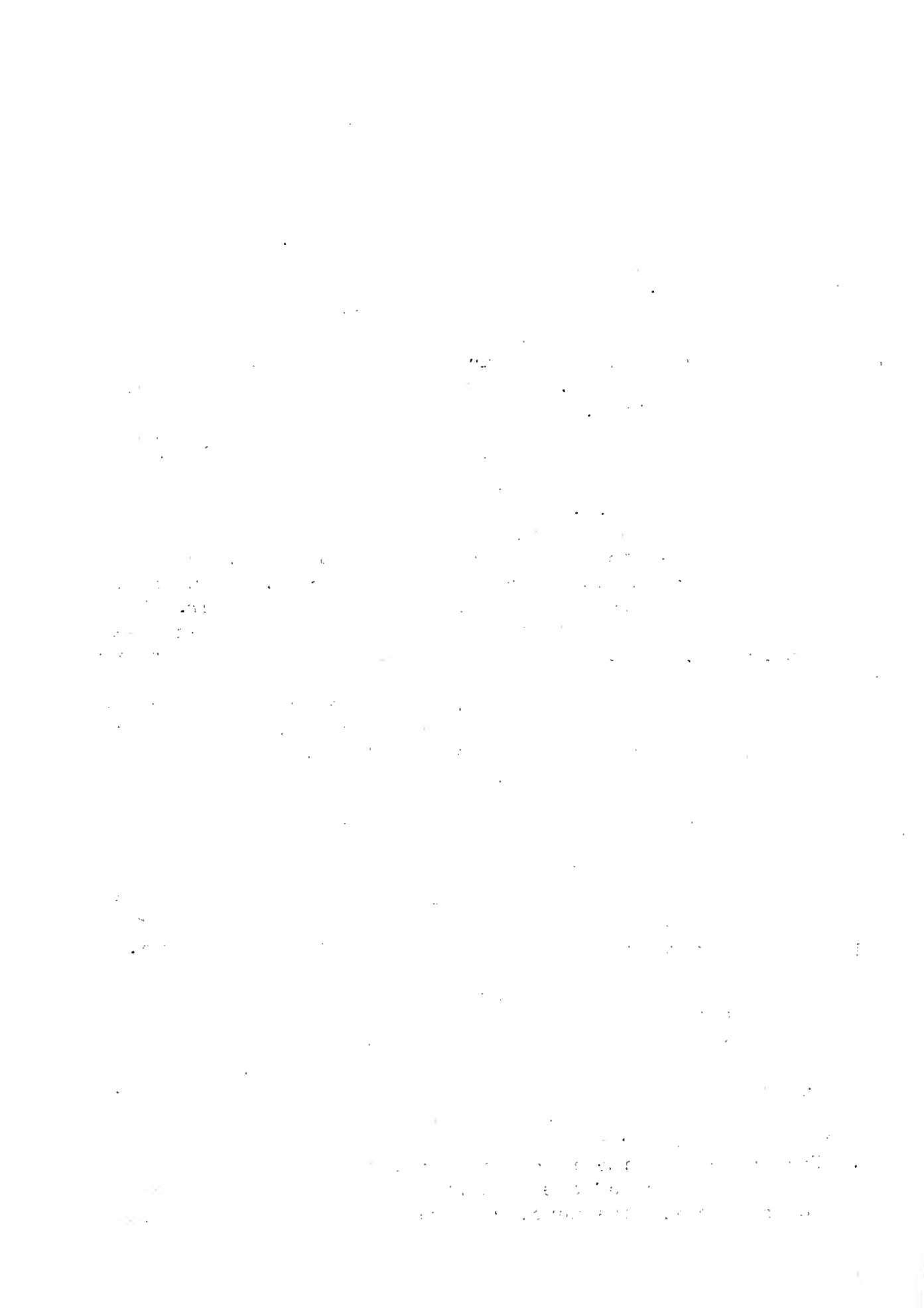
Of course the more common examples of involuntary manslaughter of this kind and nonfeasance arise where persons fail to protect those which are entitled to protection under them.

II Bishop 686

III Foster (N.H.) 355

#### EXCUSABLE HOMICIDE:

Blackstone puts it very well when he says this involves a little guilt but not enough to deserve punishment. You are all familiar with the doctrine of self defense and that is what is meant by excusable homicide. There is a false impression with reference to excusable homicide and that you may as well correct now. Excusable homicide is not criminal when committed in self defense or in defense of one's habitation or to prevent the commission of a felony. The popular impression that it is defense in





a personal combat. That is not so. One may protect himself, his servants or any member of his family.

General Principals:

1-One has a right to repel an assault with force. That is the origin of the doctrine that rests in assault and battery. We must not go further than is necessary or he will be a wrong doer from the beginning and liable criminally.

3 Minn. 270

5 Gray (Mass) 475

2-The person assualted should retreat to the wall before taking the life of his assailant. The theory is that when a man is assaulted he should get out of the way. The law says that when a man is assaulted it is a good deal better for one man to be a coward than for another man to die. He should avoid the conflict just as far as possible.

34 Ind. 18

15 Ohio st. 47

To the contrary:

57 Ind. 55

Where an assault is made with an ferous intent the party assailed may stand his ground and kill his adve sary. That is to say if the circumstances show that the assailant intends to take the life of the defendant may instead of retreating kill the assailant on the spot and he is excused.

9 Iowa 186

Again the person assailed is not required to retreat if retreating would endanger his own life.

2 Wright (Penn) 265

I touch now for the first time a subject that I shall have to refer to again and again before I get through with specific crimes. There is one factor in criminal that is your duty to understand. You have heard the familiar saying that a man's home is his castle. Now then when a man is assailed in his own home another question is involved entirely. The sanctity of a home is more sacred than that of any individual person. One assailed in his dwelling is not required to retreat. If assailed upon the street he may be required to retreat as far as possible but not so in the home.

3 Mich. 150

That was a case in which the defendant was a fisherman and he had a net house on the shore of the lake. He also had servants who assisted him in the fishing for he fished for business and not for pleasure. A number of persons in the neighborhood became enraged at the defendant and determined to make it interesting for him and came in the night with shotguns, but he went out and drove them away. They made a second assault and he became



wearied and started out with a shotgun and fired into the flock. He injured several and killed one or two. He was indicted for manslaughter. The defense was that he was in a legitimate defense of his habitation.

One may defend his family, his servants or his master whenever he may defend himself. Of course he is not justified in interfering with every brawl that comes to his observation. In self defense one is justified in acting according to circumstances as they appear to him, even though there be in fact no danger.

2 N.Y. 197

Where it is said that the fear of great bodily harm without reasonable cause is no excuse for taking life.

One who provokes an assault and then finds that he is over matched and kills is not excused.

23 Mo. 287

Now that is a case where the accused provoked the assault by pushing the deceased and then lifted a spade as though he were going to brain him. The deceased pulled a revolver and then the defendant struck the deceased with the spade and killed him. It was held that he was properly convicted of murder in the first degree.

2-In the defense of one's habitation against a felonious attack he may take the life of the assailant. He is not obliged to retreat before killing.

I Hales Pleas of the Crown 486

An attack upon a man's habitation is not felonious and is equivalent to an attack upon his person. The fact that the attack was made would certainly reduce the crime from murder to manslaughter. But, a trespass to other property than the habitation does not mitigate the crime.

I Hale's pleas of the Crown 485

The distinction between a man's habitation and other property is that you have not the right to take a man's life in defense to property.

3-One may protect his property by force but not as a rule to the extent of taking a human life when the property is not the habitation.

24 Wendall 369

In other words the mere trespass to property will not excuse the taking of life. It is better that you should lose your wealth than another man should die. One is, however, justified in protecting his property against the forceable or atrocious felony as burglary. Now gentlemen here is a practical question.

[illegible]

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being investigated.

You are in your own house and you see a man crawling in at the window under circumstances that indicate that he is committing a crime of burglary. Have you a right to shoot him? Yes you have a right to shoot him, but you have not a right to shoot him because he is stealing apples out of your orchard. But, you have the right to take the life of a man who is committing burglary, but bear this in mind that it is not because you are protecting property, it is on the theory that you are preventing the commission of a felony, and I have told you that one is justified in taking the life of another to prevent the commission of a felony.

May's Crim. Law 146

It is said, however, that one is not justified in taking a human life to prevent a secret felony.

8 Mich. 150

As a general rule one is excused or justified in taking life to prevent the commission of a forceable felony such as a rape.

#### JUSTIFIABLE HOMICIDE:

This is where one takes the life of a human being in discharge of some official or public duty. The Judge who sentences a man to be hung is guilty of homicide but that is not felonious or excusable, it is justifiable. The Sheriff is guilty of homicide when he hangs one but there is no crime.

1 Hale's Pleas of the Crown 496

#### ROBBERY

Robbery is the felonious and forceable taking from the person of another goods or money to any value, (The value is of no importance whatsoever.) by violence or putting in fear which is equivalent to violence. In this it is the wrong against the person and not the wrong against the property that is punished.

##### General Propositions:

1-The property must have been taken through violence. This is said by some authorities to involve a struggle, and some authorities have gone so far as to say that the party assaulted must have been put in fear. Well that is not true in my judgment.

5 Jones N.C. 153

2-The force used to accomplish the robbery must have been met with resistance. Simply removing property from one's pocket is not robbery (by stealth) for there is not sufficient resistance.

64 Ind. 13

5 Parker's Crim. Cases 279

64 Ind. 13

November 7-1902.

--o--o--o--o--o--o--o--o--



When we closed the last lecture we were discussing the subject of robbery. I think that I had called your attention to the fact that the criminal act must be met by resistance, and that resistance which involves simply recapture was not sufficient. The cases upon that are exceedingly refined. An old English case in which the defendant snatched a wig from the head of the prosecutor. Now the question arose at once whether or not that was robbery. It was held that there was no robbery because there was no resistance. So I think you can understand what I mean when I say that I think the law on that subject is quite refined.

5 Jones (N.C.) 165

The judge in that case says that force is of four kinds:

- 1-Prevent resistance,
- 2-Overpower the party,
- 3-Obtain possession of the property (regain)
- 4-To affect an escape.

In my judgment the true rule is this - If the facts show that the accused intended to use force, if necessary, and used force in the taking and in escaping it is robbery, otherwise it is larceny. This is not in accord with some other decisions, but I think it is the true rule. But if the property be detached from the person, however slight, this is sufficient, as snatching the watch or breaking the chain, that would be robbery unquestionably.

2 East Pleas of the Crown 709

The pulling of an ear-ring from the ear, lacerating the ear, is robbery.

2 East Pleas Crown 703

i Leach        335

You understand gentlemen that these are ear-rings and hair-pins of great value, provided they are set with diamonds.

Putting one in fear through threats is equivalent to force in robbery. Many crimes are not committed unless force is used. Fear must be such as in reason is likely to induce the person to part with his property against his will.

The fear must be of personal violence, as where a pistol is presented - that is robbery. Extracting money from another under threats of criminal prosecution is not robbery. It may be extortion but not robbery. There is one exceptional case where it was held to be robbery where a person extorted





money from another on the threat that he would annex him to the unnatural crime of sodomy. It was held that that was robbery but I do not know of another case like it.

12 Ga. 293

1 Parker's Crim. Cases 198

Property must be taken from the PERSON of the owner. By that I mean this - it may be taken through fear or threats but the property must be on the person of the owner or so near him that he is under the control of the wrong doer when he delivers up the property.

10 Crim. Law Mag. 85

3 Wash. C.C. Rep. 209

The person robbed need not be the owner of the property. It is sufficient if he have possession thereof. If you have another man's money in your pocket and it is taken from you the man who takes it away is guilty of robbery. It is no defense for him to say that it was not your property.

8 Curtis 215

The reason for that you understand is because the robbery is not an offense against the property, but an offense against the person. One taking possession of his own property through violence is not guilty of robbery. It may be trespass, assault and battery, but not robbery, because the law approves a man taking possession of his own.

Now the next crime against the person and the highest crime in the law, next to felonious homicide, and one that ought to have been considered before robbery is the crime of RAPE.

RAPE as you know involves the violation of the most sacred of human possessions - a woman's chastity. Under the Jewish law this was punishable by death, if the person wronged was betrothed, otherwise by a decree of the Jewish courts that she become his wife for life.

Under the Saxon Law the offense of rape was punishable by death. The crime, by all civilized nations, has been regarded as the most serious crime, other than treason, and some think that it is a higher crime than felonious homicide. In Michigan a party guilty of the crime of rape is punishable for life or any number of years. In some states it is punished very very severely and in others quite loosely. Now as to the definition of the crime.

Rape is the unlawful carnal knowledge of a woman by force and without her consent. Every person 14 years of age is presumptively capable of committing the crime.

(Carrington & Payne 118

Every woman ir-respective of age may be violated.

None are too young and none are too old.

1 Hale's Pleas Crown 630



The offense may be committed upon an unchaste woman. The chastity of the woman is admissible in evidence only for the purpose of deciding the question as to whether the act accomplished was done with her consent or through force.

15 Ark. 624

Now then the first ingredient of this crime is that the crime must be committed with force. The woman must resist to the uttermost. The details of the crime are not fit for discussion before a body of students. I will refer you to a few cases illustrating the proposition.

11 Neb. 276

45 Conn. 256

59 N.Y. 374

In this New York case the court put it precisely as I think the law is. Whatever the circumstances may be there must be the greatest effort with which she is capable, to preserve her sanctity. That is true or else the offense is not rape.

A child under 10 years of age at the common law was incapable of giving consent. If a person had illicit intercourse with a child under 10 years of age he would be guilty of rape even though the child consented it made no difference for she is without capacity to consent.

9 ch. 150

That is what is known in the law as the age of consent. That has been changed by nearly every state in the union. It was raised in Michigan first to 12 years, but in 1887 it was raised to 14 years, and now it has been raised to 16 years. At this latter time there was an attempt to raise the age to 18, but this was defeated upon the grounds of Blackmailing.

Consent obtained through fraud is not consent. The act under such circumstances is against the will of the mind.

13 Mich. 438

25 Mich. 335

Contrary - 50 Wis. 518

But I am inclined to think that the Wisconsin Court is not in accord with the other states.

94 Ind. 96

8 Carrington & Payne 265

If the woman is so far intoxicated or drugged that she has become insensible she is incapable of giving consent and the offense is complete, in other words she is not required to resist further than her condition will permit. If she is in possession of her faculties she must resist to the uttermost.

105 Mass. 376



## KIDNAPPING AND ABDUCTION:

Kidnapping is the forceable stealing away of a man woman or child from their own country and sending them into another. (that was Blackstone's definition.) That is not true now. A man can be kidnapped without going out of the city of Ann Arbor.

4 Blackstone comm. 219

Abduction was another crime independent from kidnapping at the common law. There is no distinction at the present time, but at the common law it was the taking away of maid, widow or wife for lucre. The term of abduction as it is now used involves the taking away of maid, widow or wife for prostitution.

## ASSAULT AND BATTERY:

This is a crime that will be one of the first cases that you will have to try for it is one of the most common offenses. An assault is but an attempt to do bodily harm, and a battery is the execution of that attempt. I never knew of a case of assault being tried alone, but an assault is an offense against the criminal law even though no battery follows.

1 Hawkin's Pleas Crown 62 sl

An assault is an inchoate violence to the person of another with the present means of carrying it into effect. Threats are not sufficient - actual violence must be offered.

45 Mich. 521

The first proposition is that there must be a present intention to strike manifested. A conditional fear to do violence is not enough. Now gentlemen that is a proposition that you don't want to let slip your minds. You cannot have a man convicted of assault where what he says indicates no present intention.

35 Ala. 363

Mere preparation for an assault is insufficient. There must be the commencement of an act, which if not prohibited, would have produced battery. It is said that the drawing of a pistol without presenting it is not an assault, but a preparation. Putting in fear by conduct and a well grounded apprehension of bodily harm is an assault, even though the battery may not be possible. The demonstration is the mischief which the law prohibits.



# CRIMINAL LAW

XIV

LECTURE XIV

43

---oOo---

We were discussing assault and battery yesterday, and if you remember correctly, I told you that it was one of the subjects in which you would distinguish yourself early in your professional career.

The particular point was whether or not it was an assault to point an unloaded pistol at a person? 1-On the theory that there was no intent to do any harm, and, 2-The execution of the attempt was not possible. I also told you that the authorities on that subject were conflicting, some holding that it was an assault and others holding that it was not.

II Bishop Crim. Law s32

I will state to you what I think to be the better rule, and it is that menace of immediate personal injury through an act such as to excite apprehension in the mind of a reasonable man is an assault. It makes no difference whether the pistol was loaded or unloaded. You understand that the whole theory of the criminal law is what is punished is what is dangerous to the public peace. The tendency of an act to disturb the public. The tendency is just as strong when the pistol is unloaded as when it is loaded. Many authorities hold, however, that when the pistol is unloaded there is no assault. That is all I care to say upon the subject of assault.

BATTERY:

Battery is the unlawful beating or other wrongful physical violence upon a human being without his consent. Of course it is not necessary that there should be any serious beating. The offense is complete in the eye of the law when any physical wrong has been done, however slight. Spitting in one's face is a battery. Knocking one's hat off his head is a battery. Now in one sense that is a battery and in another it is not a battery.

I Russell on Crimes 957

114 Mass. 323

It is sometimes said that any unlawful act followed by physical injury to another is a battery. It is said that if one sets a dog on another and the dog bites him it is an assault and battery.

43 Ind. 146

This is clearly true by all authorities that the administering of poison without force, as putting it in one's

• • •

9 6 7 8 9

1. *Y. enterocolitica* serotype 4/O:3

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

100

1. The first group of people who are interested in the study of the history of the world are the historians. They are people who are interested in the past and who want to know what happened in the world. They study the past in order to learn from it and to understand the present. They write books and articles about the past and they teach in schools and universities.



food is assault and battery. Of course the offense is punished by the statutes of most states by a more serious charge, but the offense is technically assault and battery.

8 Carrington & Payne 303

114 Mass. 303

Bishop says that the inanimate thing with which a person inflicts an injury is the innocent agent of him who has criminal intent and causes it to act in the particular instance. That is all good in theory but it is not of any great practical importance because in every state in the union there are statutes providing that if a person administers poison he is guilty of the subsequent offense even though it does not result seriously. The force used must be unlawful or unreasonable in extent - either is sufficient. The force used in making arrests is not battery. It is not wrongful civilly or criminally.

11 Eng. Law & Equity 386

But if the discipline or force used is carried to an unreasonable extent it becomes wrongful ab initio.

18 Mass. 347

Of course the battery must be against the will of the party complaining. That question generally arises where a woman claims that she has been wrongfully or indecently assaulted. If a woman consents to her own dishonor she cannot complain of an assault and battery.

32 N.Y. 525

If two go out in anger to fight together with their fists, each commits an assault upon the other.

1 Carrington & Payne 419

It has been held in Massachusetts that each is guilty of an assault upon the other whether there is any anger or not.

119 Mass. 350

Contrary - 14 Ohio State 437

Now that is all I care to say upon the subject of assault and battery and we will next take up:-

#### AGGRAVATED ASSAULTS:

A distinction is observed between a simple and an aggravated assault. Bishop says that we look upon an assault as more or less aggravated by such attendant facts as appeal to the application of a heavy sentence. It is an aggravated assault when it constitutes a part of a higher crime, as assault with intent to kill, and assault with intent to rape.

2 Bishop 42

Now under the English common law assaults on parti-

1001  
1002  
1003

1004  
1005  
1006  
1007  
1008

1009  
1010

1011  
1012

1013  
1014

1015  
1016

1017  
1018

1019  
1020

1021  
1022

1023  
1024

1025  
1026

1027  
1028

1029  
1030

1031  
1032

1033  
1034

1035  
1036

1037  
1038

1039  
1040

1041  
1042

1043  
1044

cular persons were punished as aggravated assaults. An assault upon a member of parliament was an aggravated assault; or a clergyman. We have nothing of the kind in this country. It is no greater crime to assault the President of the United States than anyone else, unless by that late congressionally enactment.

Assault with Deadly weapons was another form of aggravated assault. An assault to do great bodily harm, less than the crime of murder, is another aggravated assault. An assault to commit a higher crime than battery must be specifically proved, that is, the intent must be proved because the intent is the gist of the offense.

19 Mich. 315

Now under an indictment charging one with an assault to kill and murder, he may be convicted of a simple assault and battery, that is to say, the lesser offense is included in the greater.

19 Mass. 315

This was not so at the common law. A man could not be indicted with an offense to kill and murder and then be convicted of assault and battery. At the common law a person who was indicted for felony was not entitled to the benefit of counsel nor to a copy of the indictment. But, if he was charged with a misdemeanor he was entitled to the benefit of counsel and a copy of the indictment.

MAYHEM at the common law was another aggravated form of assault. In some cases it was a misdemeanor and in others a felony. You know what mayhem is. It has been defined to you as depriving a person of a member useful in fight. It was held in an old English case that the loss of a tooth was mayhem while that of an ear was not.

41 Texas 619

#### CRIMINAL LIBEL:

Libel is an indictable offense at the common law and generally in this country. Criminal slander at the common law was not indictable. In many states there is what is known as criminal slander by statute. At the common law, however, criminal libel was an offense that might be indicted. The theory was to prove a breach of the public peace. Of course in this country there is the greatest freedom of the press but with all of that it does not exonerate the press from liability of criminal libel.

3 Johnson cases 354

It is a writing, picture or sign made with malicious intent



toward individuals.

Now gentlemen at the common law (you are all familiar with the saying "I didn't say it, but if I did say it it is true.") the truth of the libel was no justification. The maxim of the common law was the greater the truth the greater the libel. Now this is changed by statutory or constitutional amendments in almost every state in the union. In this state the truth of the libel is a complete justification. These are for the sole purpose of modifying the common law rule. The whole theory of our jurisprudence is that the court is judge of the law and the Jury is judge of the facts. But, at criminal libel the Jurors are judges of both law and fact. Now gentlemen that is all I have to say about offenses against the person.

OFFENSE AGAINST PROPERTY:

- 1-Arson,
- 2-Burglary.

Arson is the malicious burning of the dwelling house of another by night or by day. It was a felony at the common law and a very high crime.

1-The offense is against the habitation and the personal security of the family. It is not the destruction of the property that aggravates the crime, it is the danger of the security of the family that is punished.

15 Wendall 152

26 Mich. 106

2-The dwelling house is any dwelling or building within the curtilage, used as a part of the residence. It includes the house, barn, corn-crib, shed and out buildings. By dwelling house I do not mean the place where a man sleeps. The corn-crib or smoke house is as much of a dwelling house as anything else within the curtilage.

The curtilage is merely an imaginary line surrounding the residence and those buildings used in connection with and as a part of the residence. The house must be completed and ready for occupancy and not abandoned or unfit for habitation. It is not necessary that there should be anybody in the house at the time the fire occurred. The fact that the family happened to be away does not change the question, but if it is a house that has been abandoned and is not fit for occupancy it is not a dwelling house in the sense that I have used the term.

20 Conn. 245

15 N.Y. 153

November 14-1902.

--o--o--o--o--o--o--o--o--



---oOo---

Now at the close of the last lecture we were discussing the general question of offense against the property, and first of all had taken up the offense against the habitation, and next in discussing the subject of arson we had given you some ideas of the question of curtilage. If a barn be separated from the house by a highway the barn is not within the curtilage so that the burning would not be arson. What would it be? At the present time in every state it would be statutory arson. At the common law it was not arson to burn a barn that was separated from the house by a highway for the reason that the barn was not within the curtilage.

36 Mich. 309

43 Ala. 17

26 Ohio St. 420

The fourth proposition with reference to curtilage is that there must be a burning - some waste must take place in the fibers of the wood, however slight.

What is the difference between arson and the attempt to commit arson? How far must a man go in order to be guilty of arson instead of an attempt to commit arson? It has been sometimes said that the simply smoking of the side of the house would amount to arson. A man would be guilty criminally. That is not quite true. The Courts have finally decided that some of the fibre of the wood must be charred.

30 Tex. 346

110 Mass. 403

Bishop Statutory Crimes s 310

5-Burning one's own house is not arson nor was it an offense at the common law, for you see in the definition that I gave you was the malicious burning of one's house by another. The burning of one's own house is now statutory arson.

2 Pickering 325

a-A husband who burns the house of his wife which they jointly occupy is not guilty of arson at the common law. The chief ingredient of this offense is an offense against the habitation and if he lives there it is his dwelling house, even though he has not the legal title.

26 Mich. 106

Now this has been changed by statute in most states and it would be known as statutory arson. I give you the common law arson and then give you the statutory changes.





b-1 Reversioner or Remainderman may be guilty of arson in burning the barn or house in the possession of his tenant. He is burning the dwelling house of another even though the house is his because it is an offense against the habitation and not the destruction of property.

May's Crim. Law 61

An occupant rightfully in possession cannot be guilty of arson if he burn the house, that is, a tenant at the common law could not be guilty of arson if he burned the house of his landlord.

54 Vt. 86

A tenant in occupancy of the premises has possession, and if he burns the house he is not guilty of arson but if a servant burns the house of his master he is guilty of arson because he has not the possession.

2 East P.C. 1027

6-In arson a specific intent to burn is not required, a general intent is sufficient. If one with felonious intent sets fire to his own house whereby the house of another is burned he is guilty of arson of burning the other house even though he did not have the intent to burn it. It is said, however, that dropping a match accidentally by one who is stealing on shipboard (that is statutory arson) whereby the ship is set on fire is not arson.

13 Cox Crim. Cases 550

a-Greater evil in the intent is required than in most crimes of this grade. A burning down by chance or negligence is not arson.

2 Bishop s 15

b-If one intend to commit a felony (as where one goes into a barn with the intent to steal a horse and while there strikes a match which causes the barn to burn) but in executing it burns the house of another by mistake he is guilty of arson. It is said, however, that if he only intended to commit a misdemeanor, and by accident burns the house, it is not arson, - but I think that the better rule is that it is arson.

28 Ala 30

2 Bishop s15

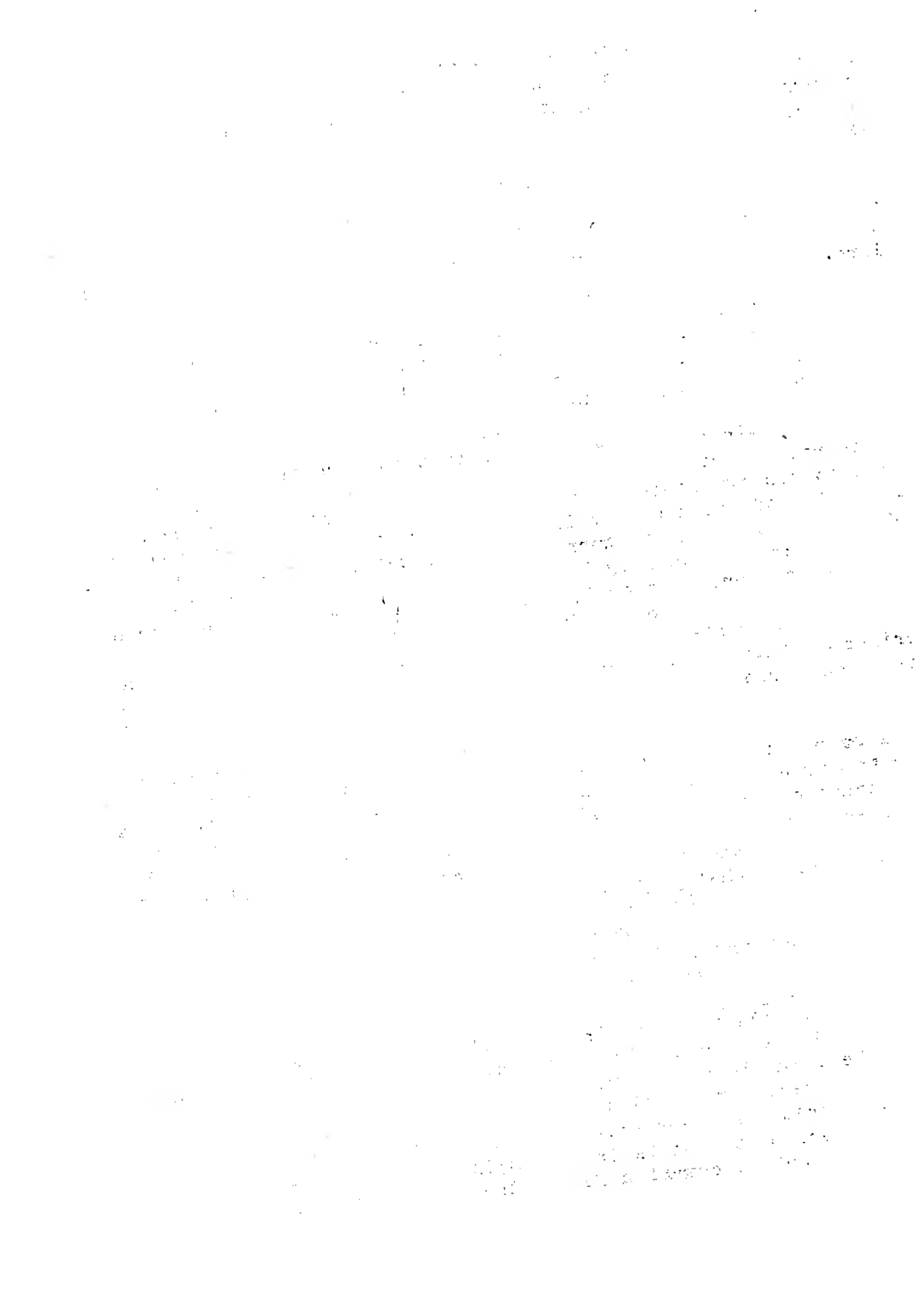
Contrary 18 Johnson 115

49 Alabama 30

## B U R G L A R Y.

We will take up first of all the common law burglary.

BURGLARY is the breaking and entering of the dwelling house of another, in the night time, with intent to commit a felony therein. Every word of that definition is important. 1-There must be a breaking, 2-An entry, 3-The entry of a dwelling house, 4-Of another, 5-It must be in the night time, and, 6-It must be with the intent to commit a felony therein. The dwelling, of



course, must be a place of actual residence or habitation or some building within the curtilage. If a man breaks into a store or a bank, it is now called burglary. Well it is statutory burglary.

43 Ala. 17

What has been previously said in regard to the dwelling house and the curtilage applies to burglary. Curtilage is the same in burglary as it is in arson. At the common law there was a holding that burglary was the feloniously breaking and entering a church in the night time with the intent to commit a felony.

2 Bishop 104

1-A breaking is necessary, but the lifting of a latch or the turning of a lock or opening a window is sufficient providing some force is used.

8 Pickering 354

a-If the house is secured in the ordinary way, any force used is sufficient, but it must be secured in the ordinary way or there is not sufficient breaking. Removing an iron grating is sufficient breaking.

22 Mich. 229

Or entering an inner door even though the outer door be open,

85 Penn. State 66

So it is introducing a knife between the lower and upper sash.

44 Mich. 305

The raising of a transom that hangs by hinges.

b-But a slight opening is regarded as an invitation to enter. That proposition always seems to me to be a little bit strange. If a person sees a door ajar and walks in he is not guilty of burglary; or if he sees a window lifted up and he goes in it is not burglary.

105 Mass. 588

c-A constructive breaking is sufficient where fraud or threats were substituted for force. Fraud may take the place of force and where one obtains admission to a dwelling house through fraud without any breaking and enters with the intent of committing a felony he is guilty of burglary.

2 East P.C. 486

85 Penn. St. 54

The breaking out of a house that has been entered without breaking is not a sufficient breaking within the meaning of the common law, but by every state in the union it has been changed by statute so if a man now goes into a house and is detected and breaks out he is guilty of burglary.

51 Georgia 285



c-There must be a breaking of some part of the house excluding entrance, as the breaking of an outer shutter is held not to be breaking because the shutters are not to exclude entrance.

5 Ala. 643

Nor is the breaking open of a trunk, press or locker sufficient.

2 Bishop 98

II-There must not only be a breaking but an entry of the person or some instrument used in accomplishing the felonious intent. The entry of a hand or finger is sufficient, also the thrusting in of a hook.

a-If only an instrument used to effect the breaking enters that is not a sufficient entry.

4 Cox C.C. 398

b-Shooting a ball through a window is on principle a sufficient breaking and entry.

2 Bishop 94

III-Now both the breaking and entering must occur in the night time. What is the night time? Night time is not determined by the setting and rising of the sun. If there is sufficient sunlight from which to reasonably discover one's features it is daytime, and the offense is not burglary.

19 Cal. 578

Bishop Statutory Crimes 276

The statutes of most states fix the hour so as to make it more definite. In Mass. night time, by statute, is one hour after sun set and one hour before sun rise. The breaking may be on one night and the entering on another, but both must occur in the night time.

111 Mass. 395

IV-An unlawful breaking and entering, unless there is an intent to commit a felony therein, is not burglary. The breaking and entering of a house with the intent to commit adultery is not burglary at the common law.

16 Vt. 551

(Theoretically) 7 Mass. 245

Burglary is an attempt to commit a crime and the rules of attempt apply. Voluntary drunkenness (by incapacity of having an intent to commit a felony) is a good defense to burglary.

2 Bishop 113

The entering of the dwelling house of another to steal his goods, when he has none there, is a burglary.

December 4-1902

--o--o--o--o--o--o--o--o--



---oOo---

## L A R C E N Y:

This is the next offense against property and, Larceny is the offense of taking and carrying away of the goods of another with the intent to deprive the owner of his ownership therein. Every word of that definition, you see, conveys an idea and if you lose a word your definition will be incomplete.

Now the fact that one takes the goods of another and carries them away does not make up the offense of larceny - there must be the intent to steal, in other words, to deprive the owner of his ownership in the goods. To untie a horse that was standing hitched in the street and drive to Ypsilanti and then turn him loose to trot home is not larceny. It is now punishable by statute.

At the common law, Larceny was divided into GRAND and PETIT, and when you are reading upon the subject of larceny in the books you will see these terms. At the present time the distinction is practically meaningless. By Grand Larceny they generally meant a felony, and Petit Larceny was so small in amount that it amounted to a misdemeanor. It is an offense against the property and the more property you injure the greater the offense. These terms are now used but the Supreme Court of Michigan said that we now have no Grand Larceny or Petit Larceny. But, at the common law if a person stole anything under 12d it was petit larceny; if it exceeded 12d it was grand larceny and punishable by death. In this country the dividing line is usually \$25.00. If a man steals under \$25.00 it is a misdemeanor and punishable by a jail sentence, and if he stole over that amount it is a felony and punished by state imprisonment. Under \$25.00 the Justice of the Peace has the original trial, but if it is over \$25.00 the Justice can only examine him and bind him over to the Circuit for trial. You see it is the value of the property stolen which determines the question of jurisdiction.

Larceny is again classified into:

- a-Simple
- b-Compound

You will find these terms in your reading, but the only distinction is that compound larceny is simple larceny accompanied by aggravated circumstances; as for instance, stealing from one's person. You perhaps have read about compound fracture in medical works - this is where the bone breaks through the skin - it is an aggravated fracture.





## SIMPLE LARCENY:

I-There must be a taking and carrying away. This involves a trespass, of course, or its equivalent. There need be only a change of place effected by the wrong doer. (a change of place, however slight) This must take place or there is no taking and carrying away.

4 Denio 364

2 Bishop s797

50 N.Y. 518

In that Denio case the defendant undoubtedly intended to steal a horse. He went into the field and coaxed the horse part way across the field with some corn. He was arrested and it was urged that there had not been any taking or carrying away, but the court held that the property was sufficiently under the control of the defendant so that the taking and carrying away was complete.

65 N.C. 395

45 Iowa 48

Manual seizure, that is, the laying on of hands is always essential, and the shooting of an animal is not sufficient unless you carry away the carcass and then you would be guilty of larceny of the carcass of the animal, in other words, there must be after the killing some slight removal of the animal.

47 Cal. 103

II-One having custody but not the legal title of a chattel may be guilty of larceny. (The only way that you can draw a distinction between custody and possession is by illustration.) A servant who appropriates property in his custody to his own use is guilty of larceny. There is what the law calls a constructive taking and carrying away.

99 Mass 428

26 Ind 101

When I say that one is not guilty of larceny I do not mean to say that he is not guilty of embezzlement.

15 Wendell 581

If a bailee appropriates the property of the bailor for his own use he is not guilty of larceny but may be guilty of embezzlement because the bailee always has the possession and so he cannot commit the crime of larceny. He stands in a different position than that of the servant.

a-The finder of lost goods who has reason to believe that inquiry will disclose the ownership is guilty of larceny if he appropriates them to his own use, in other words, a man may



find goods and go off with them and be guilty of larceny. It is his duty to find the owner if he can do so.

116 Mass. 45

But as I have said to you, when we discussed the subject of criminal intent the finding and the intent to steal must concur in point of time. If he finds the goods today without the intent to appropriate them to his own use and tomorrow wakes up with a disposition to keep them it is not larceny.

29 Ohio state 184

Where the goods have been mislaid and one knowing of the fact appropriates them he is guilty of larceny. What is the difference between lost and mislaid goods? If you go along the street with some money in your pocket, and unbeknown to you it slips through a hole in the bottom of your pocket you lose it, in other words it is lost money; but suppose you take your wallet into a store and lay it down on the counter and go away leaving it there, that is mislaid goods, and not lost. What is the value of the distinction? If a person loses an article and the servant of another finds it, that is the property of the finder - it is his against the world except the owner; but if goods are mislaid and a clerk finds them the property in the goods is the property of the employer.

6 Cox' CC 415

III-The FELONIOUS open taking without concealment is nevertheless larceny. There is a popular impression that unless one indulges in stealthiness he is not a thief - that is not true. Stealth is not an essential ingredient to crime.

41 Conn 590

IV-Now as I have said the taking must be by a trespass involving some physical force or its legal equivalent.

2 Bishop 804

Trespass involves the idea of taking of the property against the will of the owner.

2 Bishop 799

a-A delivery by mistake may be sufficient.

12 Cox' CC 260

b-Possession obtained by fraud amounts to larceny when only the possession and not the title passes.

2 Bishop 812-813

He states a case there where "Three Card Monte" men were indicted for larceny for money obtained from an old man on the cars. The indictment held against them. It was a fraud and they got possession of his money through conspiracy.

December 12-1902.

--o--o--o--o--o--o--o--o--

1

•

1

•

2.

• • •

•

100

• • •

---oOo---

I think when I closed the last lecture I was discussing the subject of larceny and had reached the point at which I wanted to call your attention to the kind of property capable of being stolen.

V-I did call your attention, of course, in the definition to the fact that larceny involved the stealing of goods and chattels from another, but what is the meaning of "Goods and Chattels?" It is not always quite clear.

a-All personal property of intrinsic value is subject to larceny. Now I will give you some examples: Milk taken from a cow or wool plucked from a sheep.

2 Carr & Payne 423

Turpentine collected from a tree,

11 Iredell 70

Gas drawn from a pipe,

4 Allen 308

b-At the common law choses in action were not capable of larceny. It was an invisible, intangible thing and was not property in the sense in which the term "Goods and Chattels" is used, but by the statutes of most of our states the stealing of the evidence of the chose, either note or bill of exchange, is larceny of the chose in action.

May's C.L. 160

c-Wild animals in a state of nature cannot be the subject of larceny, but after they have been re-claimed and brought under control they are the subject of larceny.

8 Gray 497

3 Dutcher N.J. 117 Oyster Case

At the common law, base animals not fit for food, such as dogs and ferrets were not the subject of larceny. They are called base animals because they are not fit for food. It was only those domestic animals that were fit for food that were subject to larceny.

Russell & Ryan Eng. 350 Ferret case

26 Ohio ct. 400

The modern doctrine is that all tame animals of value are subject to larceny, even though they are not fit for food.

86 N.Y. 365 Dog Case

41 Ark. 479

In that case the defendant had stolen a bird cage and a mocking bird and it was contended that he could not be



held guilty of larceny of the mocking bird because it was not fit for food, but the court held otherwise.

At the present time throughout the United States dogs are the subject of larceny. The fact that they are taxed should be considered as one reason that they are property. The most peculiar thing in the law is that a man might bring trover for a dog and recover but no man could steal a dog. It was not the subject of larceny but was the subject of a civil action in trover.

d-Realty and things attached to it are not the subject of larceny. After the property has been severed from the real estate, of course, it becomes the subject of larceny. You understand that real estate includes not only the soil but whatever is growing upon it and also involves the minerals in the earth, such as coal and lead, but once severed from the real estate they are the subject of larceny, but the severance and the felonious carrying away must not be parts of the same act. If you go to a gold mine and dig out a nugget of gold and carry it away that is not larceny.

64 N.C. 619

4 Black. 232

11 Ohio St. 104

An illustration is this - if you take an apple off a tree and eat it up that is not larceny: If you shake an apple off a tree and pick it up at once this is not larceny, but if you go into an orchard and pick up a wind-fall and carry it away that is larceny.

If minerals are severed from the earth (gold or silver) or crops from the lands and immediately carried away the offense is not larceny but if what is severed is allowed to remain on the land of the owner (that is abandoned temporarily) and then he returns and carries it away he is guilty of larceny.

8 Nev. 262

12 Cox' 60 59

26 Law Rep. 297

e-Now this principle that things fixed to realty cannot be stolen does not apply to things fixed constructively. These may be taken away and stolen, in other words, the principle that the severance and carrying away must not be the same transaction does not apply to cases of taking fixtures that are only constructively fixed, such as gas fixtures, etc.. they are the subject of larceny.

11 Ohio St. 104

14 Bush 31





VI-A thing stolen must be of some value. (of course in the eye of the law.

A man stole a bill of exchange worth several dollars and he was arrested and indicted on the charge of larceny. There were two counts against him - one was for the value of the bill of exchange, that is the chose, and the other count was for stealing a piece of paper to the value of one cent. It was held that he could not be convicted of stealing the chose, but he was properly convicted on the second count for stealing a piece of paper of the value of one cent.

I Carington & Kirwan's H.P. 725

6 Cox' C.C. 304

In this case title deeds are not the subject of larceny and at the early common law they could not be stolen because they were thought to be a part of the real estate. This is only a historical fact and will not trouble any one of you.

There must be in larceny: 1-A specific intent to steal. I think I told you that there were two intents in larceny: one was an intent to trespass and the other was an intent to steal and that the intent to steal called for a specific intent. I also told you that in the crime of voluntary drunkenness that it was a good defense to the crime of larceny. Now that is all that I care to say upon the subject of larceny, and the next crime akin to larceny is:

#### RECEIVING STOLEN GOODS:

This was a mis-demeanor at the common law. It is punished by statutes of every state in the union and is generally punished as a felony.

The offense consists in receiving stolen goods, knowing them to have been stolen. At the common law it was only an accessorial offense, but at the present time it is punished everywhere, not simply as an accessorial offense, but an independent substantive crime, and for that reason the rule that you cannot convict an accessory until you have first convicted the principal does not apply to the receiver of stolen goods, but you understand that I am speaking only of conviction. The first thing to prove against the person charged with receiving stolen goods is that larceny has been committed. Unless you can prove that goods have been stolen there is no use submitting the question as to whether or not he has been guilty of receiving stolen goods.

Harris C.L. 181

One cannot be guilty of receiving stolen goods from a wife, which she stole from her husband.

May's C.L. 197



II-The goods must have been received into the actual possession of the accused. No intent to receive them will answer the purpose. But after all, gentlemen, manual possession is not necessary. There may be actual or constructive receipt of the stolen goods.

17 Iowa 149

6 Cox' C.C. 554

4 Cox' C.C. 412

III-The accused must have known at the time he received the goods that they were stolen goods. His learning that afterwards is not sufficient.

Har·is' C.L. 181

IV-The goods must have been received to defraud the owner thereof.

I parker's C.C. 564

It is not necessary that they should be received for profit to the person receiving them. It is enough that he receives them for a purpose to defraud the owner of his ownership therein.

117 Mass. 141

V-The goods must be received without the consent of the owner.

6 Cox' C.C. 449

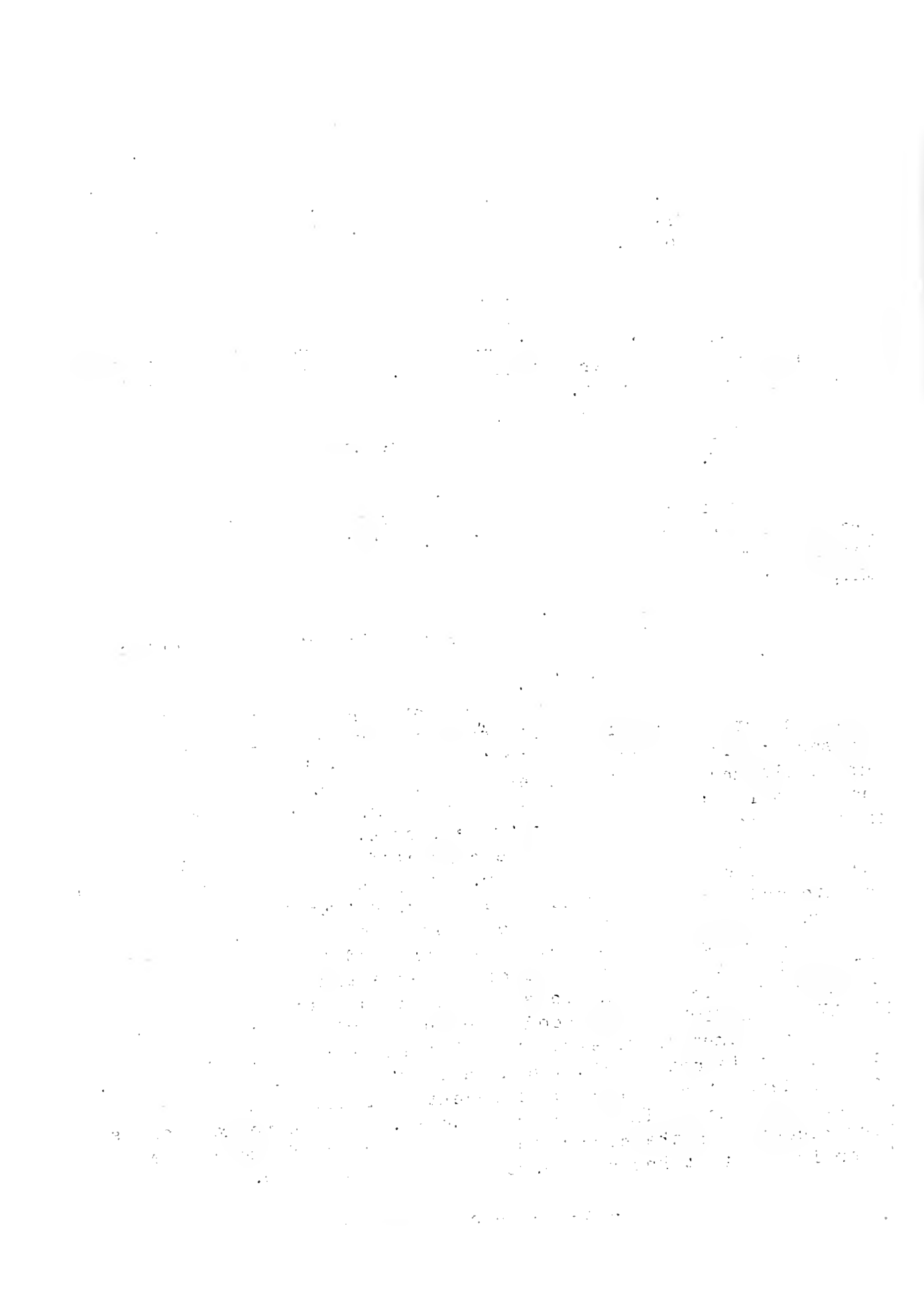
VI-In an indictment for the crime of larceny a count for receiving stolen goods may be joined and the accused convicted according to the evidence, that is, you can charge the accused with larceny and also with receiving stolen goods knowing them to have been stolen and he can be convicted on either count according to the evidence.

VII-The receiver may be convicted in one state though the goods were stolen in another. Suppose he should steal goods in Ohio and bring them over here and give them to a man here - this man may be convicted of receiving stolen goods.

VIII-Upon the subject of larceny and the receiving of stolen goods there is one bit of evidence that is generally found about which I want to say a few words, and that is, that RECENT POSSESSION of the goods stolen is evidence that the possessor stole them or received them knowing that they had been stolen. It is not conclusive at all but it is simply evidence. Now gentlemen that evidence of recent possession is very strong or very weak according to circumstances. If the possession is very recent then the circumstances are strong if the chattel taken is one that has not passed from hand to hand.

December 18-1902.

--o--o--o--o--o--o--o--o--



---oOo---

I had finished what I had to say with reference to the crime of larceny and the crime of receiving stolen goods knowing them to have been stolen. The next crime and one akin to those two is:-

#### EMBEZZLEMENT:

And it is the fraudulent appropriation of another's property by one who has the lawful possession.

99 Mass. 428

You see this is to be distinguished from larceny for the reason that in larceny the possession is obtained wrongfully but in embezzlement the possession is lawfully obtained. The felonious intent or the moral turpitude is about the same in each case but the crimes are quite different.

1-Embezzlement was not an offense at the common law. It is purely a statutory crime in almost every state and being a statutory crime and the state being in derogation of the common law the statutes are strictly construed and you must examine the statutes and notice the wording of them in your own state somewhat carefully in case you have a crime of embezzlement under investigation.

2-This crime involves a careful distinction between custody and possession. I have already referred to that distinction two or three times and the only way to get acquainted with it is for me to keep referring to it. Now in this crime of embezzlement the accused must have had possession - simple custody is not sufficient. Many men have been indicted on the charge of embezzlement and then acquitted because the facts showed that there was no possession.

Hawk. P.C. 1 c 33

a-Under the common law many wrongful appropriations of money amounted to larceny which are now regarded as embezzlement. You see the common law was going to punish the man that was guilty and there being no crime of embezzlement they would punish him for larceny.

May's C.L. 97

b-Money delivered to a servant by the master for a particular purpose, if converted by him, the offense is larceny because he simply had custody and did not have possession.

99 Mass. 430

15 Wendell 147



If money is delivered to a servant by a third person to be delivered to the master and he converts it, that is embezzlement.

2 Leach 841

In that case money was marked and handed by a person, who was assisting in detecting the wrong doer, to the servant to see, of course, whether or not he would put it in his pocket instead of the till. Well he put it in his pocket so you see it never came into the possession of the master and he was properly convicted of embezzlement. A teller of a bank or the clerk in a store, who after business hours abstracts funds is guilty of larceny because the funds have come into the possession of the master.

104 Mass. 548

116 " 1

155 " 523

3-The statutes speak of mis-appropriation by agents, clerks, servants, officers, etc. Now these terms are used in the statutes and it is not very satisfactory in regard to the meaning of these terms. A servant or clerk usually involves some continuous service, so may an agent, but an officer usually involves some public employment or some employment as an officer in a corporation neither public or private.

It is said that the distinction between principal and agent; master and servant is that the principal directs the agent what to do, but leaving him much discretion in the matter whereas the master not only tells the servant what to do but how to do it.

12 Cox' C.C. 56

Now it is said that the defendant who is indicted on the charge of embezzlement must have received the money by virtue of his employment.

Law Rep. C.C. 28

That case is one in which the owner of a ship telegraphed or otherwise directed the master of the ship to bring it home empty. So the master loaded the barge and stopped at an intermediate port and discharged the freight and pocketed the money. He was arrested on the charge of embezzlement, but the Court held that embezzlement was not the crime which he was guilty because he did not receive the money by virtue of his employment.

Embezzlement and perjury are two of the crimes that are most difficult to establish. These terms of clerk and





agent involve usually the relation of a superior and an inferior and that relation must exist wherever the terms are used. In other words, the terms do not include what are known in the law as independent contractors.

9 Gray 5

4-Embezzlement is a breach of trust and usually possession is gained by virtue of some employment.

31 Cal. 108

14 Gray 62

a-The breach of trust may amount to more than a breach of contract (but you see you must be careful about independent contractors for they do not come within the law of embezzlement) but there must be present an intent to defraud. Unless this intent exists there is no embezzlement.

35 Ill. 487

b-Failure to account for moneys according to contract is not embezzlement. What we are troubled with in embezzlement is that you must draw a distinction between that breach of contract with fraudulent intent and a breach of contract which creates only a debt. In other words, it is said that the intent and the design to cheat and deceive the owner is the gist of the offense.

62 Mich. 276

139 Ill. 586

Now that completes all that I am going to say upon the crime of embezzlement and will not take up the other crime this afternoon, but will wait until those who are absent return fresh for the new work, and Gentlemen, I wish you all a

A MERRY CHRISTMAS

AND

A HAPPY NEW YEAR

December 19-1902.

--o--o--o--o--o--o--o--o--



---oOo---

At the close of the last lecture we were discussing the subject of embezzlement. I ought to have impressed it upon your minds that embezzlement is one of the most difficult cases to maintain against the defendant for the reason that there is always more or less trouble about distinguishing between debt and actual embezzlement.

1. FALSE PRETENSES - And that is closely allied with embezzlement. Of course, in your study of "Anson" you at once think of fraud. Well I am discussing not the civil side of the subject, but the criminal side. But there may be fraud without any false pretenses (criminally) but there can be no criminal false pretense without fraud. One is punished by criminal procedure and the other is righted by civil procedure.

Now as we understand it, criminal false pretenses are statutory offenses. At the common law the modern idea of false pretenses did not exist. At the common law there were false pretenses that were indictable - they were known as "Cheats by false tokens." A simple false statement of fact was regarded as a non-criminal lie.

7 Johnson's Rep. 201

Loaded dice, false weights or measures were false pretenses at the common law. The theory seemed to be that if a person resorted to false pretenses through some token, but if he simply made a mis-statement as to his property that was a non-criminal lie. That has all been changed by the statutes of both England and America. At the present time, as a matter of fact we hear very little about false tokens.

2 Bishop 415

A FALSE PRETENSE is a fraudulent representation of the past or existing fact by one who knows it not to be true. In criminal law it must be made falsely by one who knew it to be false and such as is calculated to induce one to part with something of value.

1-It must be distinguished from larceny, and the distinction is one of importance. Where one obtains a piece of goods from another but not the title, through false pretenses he is guilty of larceny, but if he obtains both possession and title he guilty of the crime of "False Pretenses," and not the crime of larceny.



2-The criminal ingredients of false pretenses are:

a-There must be a false representation of fact.

A false supposition as to quantity or quality is not a criminal false pretense. A false supposition of present intention is not an indictable false pretense.

17 Mich. 466

2 Moody (Eng) 254

It is said however that a statement of opinion may be under certain circumstances an indictable criminal offense, but I doubt it very much.

b-The pretense may be express or implied from conduct.

7 Cal. & Payne 784

The giving of a check on a bank where the giver has no funds, if money is received on the check, it may amount to obtaining money under false pretenses. This is a very common offense. He pretends, impliedly, by his conduct that he has money in the bank when he has not. Of course, circumstances must govern those cases. A false expression of opinion as to value, quantity or quality is not a false pretense. Nor is false promises or false statements of law. The question of false promises is one that will confront you before you have practiced long. A false pretense involves a false statement of some fact past or existing and a false promise as to the future is not criminal in any sense or anywhere.

49 Mo. 542

20 NY. 413

A pretense which is true is not criminal even though the accused believed it to be false. In perjury, if a man intends to swear to a lie and by accident he tells the truth he is guilty the same as if he had sworn falsely.

3 Cal. & P. 420

c-The false pretense must have been made with the intent to deceive. So a false pretense made by one believing it to be true is not criminal. He must make it, in other words, with a criminal frame of mind with the intent to deceive.

7 Cal. & P. 354

6 Mich. 496

d-The false pretense must have deceived. Not only the intent to deceive but must have deceived. If the complaining party was aware of its falsity there is no crime.

76 N.Y. 253

May's C.L. Sec. 113



Now I said to you that the false pretense must have deceived. That is true, but not only is it true, but that it ought to have deceived. It must be of such a nature that a man might rely upon. The old rule was such as would have deceived a man of ordinary intelligence and caution. Lord Holt said that "One man is not to be indicted because another man is a fool."

50 Ind. 473

Well that is, in my judgment, the correct supposition of the law yet there is an element of truth in it. It is not every false pre ense that can be made use of in a charge of false pretenses where the charge is a criminal one. There must be some reason for believing it and that is the reason that I do not like the case of the "Cunning Woman." Any one who pays a cunning woman a consideration for bringing back her husband through magic, over hedges and ditches, is not, in my judgment far from being a fool.

The modern rule is this - "The weak minded are not to be left to the mercy of the strong." Unfortunately there are fools in the world who are not responsible for their mental condition and they are not to be left to be preyed upon by those who have stronger minds. The modern rule is that the state is for the protection of the weak as well as the strong. The only inquiry is, "Did the pretense deceive, if so then whether or not it ought to have deceived?" If it ought the crime has been committed.

14 Ill. 348

1 Eng. Law & Eq. 550

e-The false pretense must have defrauded. Not only deceive but it must have defrauded the person. something of value must have been parted with in reliance upon the pretense.

Thac . C.C. 428

It is not necessary that the false pretense should be the only inducement that leads to the fraud. Of course there may be various inducements that induce the fraud and the party parting with property may rely upon one ~~xxx~~ or the other. It is not necessary, however, that the false pretense be the sole inducement.

3-Usually the property parted with must be such as is subject to larceny. That would depend largely upon the wording of the statute, but as a rule the statutes are framed in such a way as to include the parting of something that is the subject of larceny - "Goods, Wares and Merchandise." The obtaining of credit on account is not sufficient.





Where a man has an account and he obtains an extension of credit upon the false pretenses of his property, he is not guilty of making false pretenses.

15 Iowa 412

75 Wis. 490

This is a peculiar case. The defendant had obtained board and lodging for a considerable length of time upon false statements. The state provides punishment for false pretenses wherever one obtains "Goods, Wares and Merchandise or other property." He was indicted and the question immediately arose as to whether he had recd Goods etc. Of course he had received plenty of food. But the Court held that it was not receiving Goods, Wares etc.

4-The statute usually punishes a cheat by false tokens, that is, the statutes are usually declaratory of the common law. Now under these false tokens "Tricks of the Trade" are generally punished.

2 Bishop 447

One of the tricks that passed through the courts is the selling of butter and cheese by false tokens.

5-False pretenses to obtain money for charitable purposes are indictable.

107 Mass. 486

17 Wendell 351

In the Mass. case a man went into a town and pretended to be a minister of the gospel and was collecting money for foreign missions. He called upon the ministers of all the churches and gathered together quite a sum of money and went away with it. The money did not get into foreign fields very soon. He was arrested and tried upon false pretenses. He made this defense that he was obtaining money for charitable purposes, but it was held that the false pretenses were indictable.

6-Where both parties in the transaction are guilty of false pretenses the guilt of one is no defense to a charge against the other.

8 Cushing 571

puffing one's wares is not indictable. A man when selling has a right to puff his wares and if he does make false pretenses it does not render him indictable. But fraudulent devices made for the purpose of creating false impressions as to facts are indictable as false pretenses.

4 Denio 425

January 8-1903

--o--o--o--o--o--o--o--o--o--o--



C R I M I N A L    L A W

XX

L E C T U R E    XX

66

---oOo---

As you will remember we were discussing the subject of offenses against the property. And had discussed embezzlement. We will now take up forgery.

FORGERY is the fraudulent making or altering (you understand that the popular acceptance of forgery is that you must sign somebody's name to a note without authority.) or a writing to the prejudice of another man's right. If nobody is hurt then it is not a criminal forgery. You see the word "Fraudulent" is there. Now I have given you a definition of forgery, but the only authority I have is at:

4 Black. 247

1-The instrument must have pecuniary importance. It will not do to convict a man of forgery because he falsely signs his name or the name of another person to an ordinary letter of affection.

7 Cox' C.C. 494

That was a case in which the defendant had an etching of a man of great importance, but it was not a signed proof. He forged the signature of the artist and sold the picture as a signed proof, but the court held that it was not forgery. If the man had been indicted for false tokens I doubt whether or not he would have gotten off so easily.

The forging of a letter of recommendation may be forgery if it involves financial responsibility. In other words, if a man should forge a letter of recommendation, which places the party to whom it is addressed under some financial responsibility the forfeiture might be indicted.

2 Greenleaf 365

But a false letter intruding one to the hospitality of another is not a forgery.

67 Ill 91

2-Where the forgery consists in the altering of a written instrument the alteration must be a material part.

27 Iowa 420

But the alteration of an instrument having no legal effect, that is, the instrument itself has no legal effect or or any pecuniary value is not forgery. In other words, the instrument altered must represent some pecuniary value and it must have some legal effect, and the alteration must change it otherwise it is not forgery to alter it.



The altering of a void bond is of no importance: - it is not forgery.

2 East Ple. C. 953

I have said that the alteration must be of a material part. What is a material part of the instrument? If it does not change the legal effect the alteration is not material and therefore it is not forgery.

6 Mass. 519

7 Iredell 216

Take a promissory note for example and you raise the rate of interest from 6% to 8% by alteration. If that is done fraudulently that is a forgery. It changes the legal effect of the instrument.

3-It is not necessary that the name forged should be of some person having legal capacity. The name of a fictitious person or of one deceased may be forged. The idea being that there shall be a fraudulent intent to impose upon the person who is effected by the forgery.

13 Ohio 453

21 Wendell 309

One may forge his own name if he represents it to be the signature of another. It is not uncommon to find two men by the name of John Smith, and supposing one John Smith signs his name to a promissory note and represents that it is a John Smith of some other place. The banker receives it as such. The man who presented the note is guilty of forgery because he represented the name as the signature of another.

11 Gray 197

4-The writing forged must purport to be the act of another. Fraudulently inducing another to sign an instrument other than he intends to sign is sometimes held to be forgery but I think the weight of authority is against it. He may be guilty of almost anything else but not forgery.

Foster v McKinnon

I Bishop 584

II Bishop 589

There are others that differ with me and you may take your choice.

5-It is not necessary that the forgery should be successful, that is, it is not necessary that the crime should accomplish any thing in particular. It is sufficient if there was an intent to defraud some person. You will discover at once that this subject is closely allied to the subject of uttering false paper, which I shall speak of presently.

15 Mass. 526



Fraudulent misreading paper is not forgery. But that will depend altogether upon which line of cases you follow.

22 Penn.St. 390

UTTERING FALSE PAPER. This is a substantive offense and independent from the crime of forgery. It is an attempt to cheat by a false document. You will notice that I use the word "false" instead of "forged" This is usually regulated by statute and the statutes of these several states are not in harmony, but the general principles here laid down govern all of them.

1-The offense is complete when the false instrument is offered. That is sufficient uttering to offer it. It need not be accepted and the fact that it is not accepted is no excuse.

25 Mich. 388

What is a sufficient uttering? Of course the offering of it to a bank etc, would raise no question, but there are troublesome cases of uttering and in order to impress upon your minds what is meant by it I will give a few illustrations. The putting of a false deed on record is a sufficient uttering. One man may forge a deed and another man take it after it has been forged and put it on record. The bringing of a suit upon a false or forged note is a sufficient uttering. In other words, any attempt to make use of the instrument as genuine is sufficient and whatever form or attempt it is is of no importance.

27 Mich. 356

15 Upper Can. Q.B. 118

2-It is not necessary that the crime of forgery be committed. The paper may be false without being forged.

15 Upper Can. Q.B. 48

3-Having possession of forged paper with an evil intent is not punishable. But it is said that the procuring possession of forged paper with the intent to use it is sufficient.

I Bishop 204

COUNTERFEITING was punishable at the common law as a cheat and was a mis-demeanor. counterfeiting is the making of false coins in the similitude of the genuine (that is the common law offense) with the intent to defraud. Of course it resembles forgery but it differs from it in the fact that in forgery there need be no resemblance to the genuine, but in counterfeiting there must be a likeness of the genuine.

9 Howard 560





This offense may be one against the state and also one against the U.S. We have a dual sovereignty and so a man may commit an offense and it be against both sovereigntys. So if a man counterfeits coin or paper he may be guilty of a crime against the state and also against the U.S. He may be punished in the state and serve his sentence then be tried, convicted and sentenced in a charge brought by the U.S. As a matter of fact, however, a man is seldom punished but once.

MALICIOUS MISCHIEF is the malicious injury to the property of another.

1-At the common law the wrong was punished as a mis-demeanor if it involved cruelty to animals or was done in the night time. It was not punished except as a mis-demeanor and then it was not punishable unless it involved the cruelty to animals or was done in the night time.

5 Denio 277

3 Grat. 708

The statutes of the several states make the offense a felony, I think in every state in the union, and the statutes are so drawn as to reach almost every form of injury to property - real or personal: individual or corporate.

2-The crime is complete whenever there is a wanton or reckless destruction of property. It is not necessary that any express malice against the owner of the property be shown.

72 Mich: 172

Now the more common examples of malicious mischief that you will find in your statutes are against the disfiguring of animals. The cutting of the tail or mane off a horse is malicious mischief. Another and more common form is the injury to mill dams. If you pull out the boards so as to let out the water it is malicious mischief and is expressly punished by the statutes of most states. If you have an actual case of this kind study your statutes carefully and if you cannot find something covering it your statutes must be very far behind those of Michigan.

January 9-1903.

--o--o--o--o--o--o--o--o--



When we closed the last lecture we had concluded what we had to say with reference to malicious mischief, and also concluded the subject of "Offenses Against Property." We come now to another general topic:-

OFFENSES AGAINST PUBLIC JUSTICE:

PERJURY is the lawful false swearing (Every word of this definition is important) in a court of justice on a matter material to the issue. We shall see that there may be false swearing punished as perjury where the false swearing is not in a court of justice, but these cases are rare and we will point them out. Now as to the criminal ingredients:

1-There must be a lawful oath or affirmation. And this oath or affirmation must be before a competent officer. It is not every student of the U. of M. that can take an oath and make a man guilty of perjury under false statements. This oath must be in form of l w.

4 Parker's C.C. 213

An OATH is a declaration of fact (not a promise understand) on appeal to some supreme being for its truth or the truthfulness of the man who makes the statement. An AFFIRMATION simply omits the appeal to some supreme being. You are aware that there are many people who conscientiously believe that no man should take an oath on an appeal to the supreme being. The law of nearly every state recognizes this conscientious scruple and parties are either permitted to swear or affirm that they will tell the truth, the whole truth and nothing but the truth. Now formal omissions in administering an oath are not important.

17 N.Y. 373

2-The oath must have been given in some judicial proceedings or in a cause in court.

16 Iowa 36

42 Vt. 446

You want to keep in mind that the false swearing must have been in some court where there was a judicial inquiry involved or in some proceeding in action with the case pending in court, otherwise it is not perjury, except for the reasons that I shall give.

a-The offense also includes a false oath to an affidavit required by law. You will notice affidavits in newspapers. What does that amount to? You can't found perjury on any such ground as that because it was not in a judicial proceeding and are not required by law. And you all know that every man installed in a public office has to take an



oath of office. Then it turns out that he fails in his performance of duty. He is not guilty of perjury. A false promise only has a moral binding and has no effect in the law.

3-The oath taken is often called a CORPORAL OATH. It is called a corporal oath because the oath as originally administered involves some act as the kissing or the laying of the hands upon the bible. Some physical manifestation in recognition of the solemnity of the oath. In most of the western states it is by the uplifting of the hand.

9 N.Y. 96

Where it is said that any bodily assent is sufficient. Some outward form of manifestation is necessary in every jurisdiction.

86 N.Y. 154

The exact form of administering an oath is said to be directory.

11 Allen 243

In that case the statute had been modified and called for the uplifting of the right hand. The accused followed the old style of kissing the bible and when he was indicted for perjury he made the plea that he did not do it in the proper manner required by law, but the court decided that he had filled all the requirements.

3 Minn. 444

It was here held that the form required is mandatory and not directory.

4-The oath must be wilfully false as to some past or existing fact.

a-False swearing by mistake is not perjury. There is some doubt about that but I think it arises from the fact that the courts are a little suspicious of that defense.

36 N.Y. 434

11 Bishop 1047

Here the two views are expressed.

b-Oaths of office although false in the end do not amount to perjury.

1 Hawk. Pleas C. c 69

There may be perjury even though the facts sworn to be true if the accused believed it to be false. Theoretically that is correct because the offense is not against the individual, but it is against justice and one who intends to swear falsely has committed as great a crime as though he did swear falsely.

Harris C.L. 73

11 Bishop C.L. 1043



While the false swearing must be wilful, ~~still the~~ voluntary intoxication of the accused is said to be a good defense.

2 Parker's C.C. 19

2 Bish. 104 takes some exception.

The state courts have no jurisdiction to punish perjury against the United States, in other words, suppose a man come into the federal court at Detroit and he swears falsely. He perjured himself within the ~~both~~ bounds of the state of Michigan, yet he did not offend the courts of the state of Mich. or the sovereignty of this state.

32 Ark. 117

5-The testimony must have been material to the issue. It need not be the main issue, but it must be material either to the main or collateral one.

12 Met. 225

Suppose that one should swear falsely as to their age - that is not perjury because it is not material to the issue.

2 Bish. 1033

a-Courts are divided as to whether the materiality or the false swearing is for the jury or the court, because in the prosecution for perjury one of the first questions is to ascertain what he swore to material to the issue. Some courts hold that it is for the jury and others that it is for the court.

May's C.L. 188

On principle the question is one for the court and not for the jury.

6-At the common law one could not be convicted of perjury except on the oath of two witnesses. If he swore that a certain thing was a fact you must prove by two witnesses that it was not a fact. The reason was that a man should not be convicted simply by having his testimony weighed against that of another man, but that is not true at the present time. The present view is that the jury is to pass upon the question as to what was testified to was true or false, and the testimony of one witness in view of all the circumstances may be of greater weight than others, and he may be convicted on the testimony of this one man.

29 Ind. 442

10 Ohio St. 258

SUBORNATION OF PERJURY is the procuring of another to take a false oath or to commit perjury. It is punished now in every





state in the union as a substantive crime.

1-The false oath taken must of itself have amounted to perjury. So you must prove that perjury has been committed

2-That the defendant procured the perjury. It is a very common crime and very seldom punished.

a-At the common law both parties were guilty of perjury, but now the subornation of perjury is punished as an independent crime. In order that the defendant shall be guilty of subornation of perjury both parties must believe that the matter sworn to is false. Solicitation for one to commit perjury is a criminal attempt.

BRIBERY is where a judge or other officer concerned in the administration of justice receives undue reward to influence his actions. It is an offense against public justice. It was a misdemeanor at the common law but it is usually punished by the states as a felony. Now the statutes usually provide for the punishment of bribery of:-

- a-Judicial Officers,
- b-Administrative Officers,
- c-Electors at an Election.

Of course in a given case you must consult the statutes of the state where the offense is committed before you can determine whether the case is within the statute or not. He who gives is as guilty as he who receives. There is a popular impression that a man who receives money for his vote at an election is the guilty party only. Attempts to bribe are frequently punished as a complete offense and punished somewhat severely. One who votes for a reward or one who refrains from voting is guilty of bribery.

II Bishop s 86

The gist of the offense is the perversion of justice.

2 Va. Cases 460

Now then there are some manual offenses against courts of justice:

1-EMBRACERY - involves an attempt on the part of persons to influence the verdict of a jury by reward, entertainment, etc. It is a very common offense and very seldom punished.

January 15-1903.

--o--o--o--o--o--o--o--o--



---oOo---

Now when we closed the last lecture we were considering some of the minor offenses against public justice and had spoken briefly of embracery.

Compounding a felony is failure to prosecute a felon but simple failure is not quite enough. There must be an effort to avoid prosecution of a felony. It is punished as a substantive crime. The gist of the offense is the intent to stifle prosecution by giving a reward whereby one is kept from a court of justice to testify. Compounding a misdemeanor is sometimes authorized by the statutes of the state, that is, permitting the parties to get together and settle the matter on a pecuniary consideration.

PRISON BREACH is the breaking and going out of prison by one lawfully confined therein.

a-There must be an actual breaking out. Some force must be used. Walking out of an open door is not prison breach.

b-The prisoner must escape or the offense is not complete, in other words, he must get out from under the custody and control of the law.

c-The person may be in a place of confinement such as stocks or yards. Many prisoners are placed to work in yards cracking stone, and if they escape from their keeper they are guilty of prison breach.

d-The imprisonment must be lawful. If it was unlawful the party has not committed the offense. The only question was he confined by a proper warrant. If he was it is his duty to remain there. It is said that the breaking from prison by necessity is not a prison breach. Of course if a prison should take fire the man has the right to make the prison breach without being guilty of the offense.

RESCUE is the delivery of one from lawful imprisonment by a stranger. One who assists another by passing in a saw, hammer or some other instrument with which to release himself. It is a substantive crime, but it is sometimes punished as an accessorial crime to prison breach.

ESCAPE is of two kinds:

a-Prisoner escaping from lawful imprisonment.

b-An officer voluntarily or negligently suffering a prisoner to escape from lawful imprisonment. It is the criminal escape that I am talking about now. It is an offense



against the public peace.

AFFRAY is the fighting by mutual consent of two or more persons in some public place to the terror of the people. It is a substantive crime. The theory of the law is that it is the fright and annoyance of the public that is the gist of the offense. A worded dispute is not an affray, otherwise the offense would be too common.

13 Geo. 322

One who fights in self-defense is not guilty of an affray. It must be by consent of both parties. If one party is acquitted the other must be. One may be guilty of assault and battery and the other entirely innocent, but not so with an affray. The place must be a public place or one in view of the public. A secluded spot in the woods is not such a place.

22 Ala. 15

RIOT is such disorderly conduct in three or more persons assembled and actually accomplishing a purpose as is calculated to terrify others. The theory of a riot is the terror of the people.

2 Bish. 1143

It was a mis-demeanor at the common law, but now it is punished in almost every state as a felony.

1-The concurrence of three or more persons is required.

2 Alle 150

This number is sometimes changed by statutes. Under slavery it was held that two free men and one negro might make a riot. It is thought that two persons and the wife of one of them might make a riot, but the proposition is doubted on the theory of the common law that the husband and wife are one. If two other persons do the active mischief and a third person is present abetting, then the three are guilty of riot.

33 Me. 554

As a general rule riots are committed every day, but no one is punished. Public sentiment is always slow to convict and nothing is done unless personal injury is done or some property is damaged.

2-The thing contemplated must be executed. That is to say what is attempted must be executed to the extent of terrifying the people or there is no riot.

There are three terms used in the law, all of them kindred but scientifically distinct.



1-Unlawful assembly - That is where they assemble with an intent to commit an offense but do not do it. They are guilty of an unlawful assembly but not of a riot.

2-Route - If they assemble and attempt to execute the unlawful purpose and fail it is then called a route.

3-Riot - If the purpose for which they assemble is executed it is then called a riot. I do not know as there is any practical value of these distinctions, but I give them to you as you will run across them in your reading.

45 N.H. 83

4 Blackstone 146

A salvation army gathering in the street is not an unlawful assembly.

15 Cox' C.R. 158

It is some times said that in order to be a riot there must be an unlawful assembly of persons for an unlawful purpose. That is not always true. A lawful assembly may, under certain conditions, be converted into a riot.

CONSPIRACY is an agreement between two or more persons to do an unlawful thing or a lawful thing by unlawful means.

1-The gist of the crime is in the agreement. The crime is completed when the agreement is made because it is at that point that the public peace is in danger. Of course, if two or more persons conspire to commit the crime of murder it is clearly a case of conspiracy, but suppose they conspire to secure from another a promissory note. This is the taking of a lawful thing by unlawful means.

5 McLain C.R. 213

25 Vt. 415

It is not material that anything should have been done under the crime. The offense is completed when the agreement is made. As to what is a sufficient unlawful act the authorities do not quite agree. A conspiracy to do a criminal act or a lawful act by criminal means is equally punishable as a conspiracy.

2 Tenn. Rep. 734

6 Alabama 765

4 Walstead NJ293

Generally speaking, by weight of authority, conspiracies to injure or disgrace one in his character or business are criminal conspiracies.





2 Lord Raymond 1167  
12 East 302

An agreement wrongfully to the injury or prejudice of another in his right is indictable, in my judgment, by weight of authority.

3-A conspiracy to commit a felony is merged in the felony actually carried out. That is so in theory, but you must not take that as being safe law in all circumstances for it is depending upon the wording of the statute, and if he is convicted of a felony, they say that he cannot be convicted of a conspiracy. But it is said that a conspiracy to commit a mis-demeanor is not merged in the committing of the mis-demeanor because the conspiracy, as a rule, is a higher crime than the mis-demeanor.

15 Me. 100

FORCEABLE ENTRY AND DETAINER: This applies in all crimes against the real estate, and not against the person. It was not an offense at the early common law but was made so by early English statutes. It is commonly punished at the present time before a justice of the peace. There is a civil action for the recovery of lands and then there is a criminal one and this consists in "Violently taking or keeping possession of lands with menace or force, and of course, without the authority of law.

4 Blackstone 148

1-The gist of the offense is the actual or threatened personal violence to the terror of the people.

4 Rushing 141

43 N.Y. 152

a-Threatened injury to property is not sufficient. The threats must be against the person.

May's C.L. 168

b-Such force as amounts to a gentle laying on of hands.

5 Cush. 214

Of course, one may recover his own by use of lawful force.

c-The offense may be committed by one or many. A forceable entry and detainer may be indictable even though no one be present or in actual possession of the property. It is the intention that is punished.

52 Barter N.Y. 198 It is not necessary that the one in possession have the title. A co-tenant may also be guilty if he forceably ejects his co-tenant.

January 10-1903



MORALS AND RELIGION:

ADULTERY involves the voluntary sexual intercourse between persons, one of whom is married. Adultery was not an offense at the common law. It is a serious crime in the states and it is an offense to day in England, by statute. Adultery was taken cognizance of by the Ecclesiastical courts but was not known in the common law courts. The offense is made a felony by the statutes of nearly every state in the union. But, the offense is one thing in one state and another in another. There are, I think, three different forms of the offense:

1-In some states one of the parties must be a married woman. In other words, a married man cannot commit the crime of adultery by illicit relations with an unmarried woman. That distinction is made because it is regarded as an offense against the household regarding the legitimacy of children.

4 Minn. 335

11 Gen. 53

a-This rule does not prevail in divorce proceedings. Supposing the woman should file a bill for divorce against her husband, the fact that he had illicit relations with an unmarried woman would justify the charge in divorce proceedings, but in the crime the woman must have been a married woman. In some states an unmarried man cannot commit adultery.

2 Dallas (Pa) 124

The wording of the statute is what must be observed. For as I said, it was not an offense at the common law and you must in a particular case observe the wording under which the conviction is to be asked.

2-In many states it is adultery where either party to the illicit relation is married. That is true in Mich.

3-The offense of Living in Adultery (you will find there is adultery; living in adultery and lewd & licentious co-habitation) involves something more than a single act of illicit intercourse. It means living in adultery under such circumstances as becomes offensive to the community in which they live.

39 Ala. 554

116 Ind. 464

4-Both parties may be charged with the crime and tried together. One may be convicted and the other acquitted. That seems illogical, but where one of the parties to the illicit relation was so far intoxicated as to be



incapable of giving consent. In that case she might be held innocent and still the wrong doer would be held guilty.

153 Mass. 577

5-In Mich. (and of most states) complaint must be made by a party to the marriage contract violated. In case of most crimes anybody that happens to know the fact may make complaint and secure the arrest of the wrong doer, but that is not true in the crime of adultery. You say "Why is that so?" This state says, "We are more interested in the maintenance of the marriage relation than we are in the prevention of crime and if the parties to the marriage relation violate it and they are willing to condone the offense the people are more protected than they should be by its punishment. The happiness of the home is the first thing that the state interests itself in."

6-A man may be convicted although he believed the woman to be unmarried and marry her before co-habitation. I think that this is the most outrageous doctrine of law that I ever had occasion to give students on the subject of "Criminal Law."

11 Allen 23

Bishop St. Crimes 557

7-Where in a statute the term "Adultery" is used but not defined the unlawful act would be adultery in the party married but not in the party unmarried unless the crime is so defined. It might be fornication in a party unmarried, but that is an offense that is not punished in every state and not in Mich.

Bish. St.C. 656

8-There must be a subsisting marriage. "When you come into the field of criminal law you must prove a valid marriage and you can't prove it by reputation and co-habitation."

43 Me. 258

9-If the husband find his wife in the act of adultery and kill her or her paramour he is guilty of manslaughter that is, legally guilty. (Whether or not a jury would convict him I can't say.) If he should have sufficient "Cooling Time" then the killing would be murder.

8 Cal. 2 P. 182

35 Ind. 80

62 N.Y. 229

10-On the indictment of adultery one may be convicted of fornication, providing it is a crime in the state where the indictment is complained.

FORNICATION is the illicit relations between persons who do not bear legal relations to anybody else, which would make the offense adultery.



RULES OF EVIDENCE:

1-Where the husband or the wife is defendant, neither can testify as against the other without their consent.

a-But either may testify against the adulterer, who is not a party to the marriage relation.

b-In some states neither can make complaint against the other.

42 Mo. 572

1 Gratton Pa. 218

22 Iowa 364

2-The fact of marriage must be proved - simple evidence of co-habitation is not sufficient.

1 Bishop Mar. & Div. s 442

It is said, however, in Mich. that marriage in this class of cases may be proved by confession of the accused.

39 Mich. 208

3-It is not necessary to prove the particular time and place of the particular act of adultery, but of course, the jury must find in their verdict some time and place.

4-Acts of familiarity prior to the time charged may be shown, also subsequent acts of familiarity to the parties of the illicit relations. Of course, you understand the rules of evidence that parties can't be convicted of one offense by proving another. While that is true, yet if the defendant is charged with the crime of adultery with a certain person acts of familiarity with that person and the defendant, both prior and subsequent to the time charged may be shown as cohabitation evidence.

2 Gray 354

a-These acts must not be too remote in point of time. unless these acts form a connected series of improprieties.

53 Mich. 525

52 Mich. 569

Prosecution for adultery must be commenced within one year, therefore acts of impropriety dating back two years was held to be too remote. The complaint against the crime of seduction must be commenced within two years. The theory of the law is that these offenses be dealt with promptly or else let sleep forever. One of the most important things in the administration of justice is that the stench in a social community should not be allowed to remain for any great length of time.

5-The defendant may be convicted (that is, charged with the crime of adultery) on his own confession but in divorce proceedings he cannot be convicted on his own confession.





BIGAMY & POLYGAMY:

This is the offense of having a plurality of wives or husbands. The common law did not take cognizance of this offense it was controlled almost entirely by the Ecclesiastical courts in England. In this country it is made a statutory offense and is also a statutory offense at the present time in England.

1-The first marriage must be legal and must be clearly proved. The offense of bigamy is very frequently a very difficult offense to establish, for the reason that if a person is going to commit that crime they desert their lawful wife or husband and go into some other state and there marry and there they stay. If you arrest them you have got to go to the other state for the legal proof of the first marriage and prove it securely.

Bishop St. C. 593

2-The offense is punishable when in the jurisdiction where the second marriage is solemnized. It is the solemnization of the marriage that is punished.

8 Pick. 483

3-It is not necessary that the second marriage should be valid or in true form. A common law marriage is sufficient.

Bish. St. Cr. 590

The gist of the offense is the solemnization of the marriage.

4-A party may be guilty of bigamy if he marries in violation of a decree of divorce. Now you are aware that in many states it provides that neither party shall marry within a certain number of years. Well suppose he does he may be guilty of contempt of court or bigamy.

a-It is not so if he marries in another state containing no statutory prohibition.

113 Mass. 458

Unless the marriage in the foreign state was a fraudulent evasion of the law.

5-A divorce obtained in a foreign state court, having no jurisdiction, is no answer to the charge of bigamy.

28 Ala 17

25 Mich. 247

In that connection see recent U.S. Supreme Ct. Case. (Perjury is the wilful false swearing in a court of justice on a matter material to the issue. - Corrected from page 70.)

January 22-1903.



SEDUCTION arises where a woman is led from the path of virtue by an adequate inducement. That must be distinguished, of course, from every improper illicit relation. It is generally understood that a promise of marriage is an adequate inducement. It is sometimes thought that that is the only inducement that the law recognizes - that is not true. A money compensation or any pecuniary reward is not an adequate inducement. Whatever the offense may be, procured under such conditions, it is not seduction. In Mich. A man of strong will led a young girl of weak mind astray by presents. The court held that in view of the relative position between the parties he might be held guilty of seduction. I have now finished what I have to say upon the substantive law of crimes. I will call your attention to some of the substantial rights

of the accused in CRIMINAL EVIDENCE:

1-RIGHT TO A TRIAL BY JURY - This right is preserved by the constitution of the U.S. and also by the constitution of most of the states. It was a common law right and the const'n of the U.S. and of the several states are declaratory of the common law and must be interpreted in accordance with the common law. This right can't be modified or abridged by the state legislature where it is preserved in the const'n. Mich says "In all criminal trials the right to a trial by jury is hereby preserved." This trial is as it was at the common law and not such a right as the legislature may think is wise.

58 Mich. 742

43 Mich. 443

This right can't be waived by the accused.

The jury must consist of TWELVE (12) men qualified to sit and a unanimous verdict is required for conviction.

16 Mich. 351

The legislature cannot require the jury to give a special verdict. The defendant in a criminal case is entitled to a general verdict "Guilty or Not Guilty."

32 Mich. 1

2-Right to defend in person.

1-The accused is entitled to be personally present at every step of the proceedings. That is true from arrest to sentence. This right he cannot waive. The doctrine of waiver does not apply in criminal cases.

110 U.S. 574

This rule is applied to all trials for felonies, and some courts held that it may be applied to mis-demeanors.

67 Ill. 278

16 R.I. 401



This right may be forfeited by the accused escaping from the court during the trial.

56 Ark. 4

2 Cal. & P. 413

2-Any step taken in the absence of the accused violates this right. The jury cannot be called in his absence. Arguments of the counsel, taking of testimony and the charging of the jury must all be in his presence and so the receiving of the verdict.

18 Pa. ct. 103

110 U.S. 574

Motions for the continuance or for a new trial, or for amendments of pleadings may be made in his absence.

45 Kan. 492

63 Mo. 159

121 Mass. 371

3-The record must show on its face that the accused was present. It cannot be shown by verbal testimony.

6 Penn. St. 345

### III-Representation by counsel:

1-This right did not exist at the common law. The court was supposed to be the accused' counsel. 2-This right to be defended by counsel is now observed by every state in the union. 3-The court may assign counsel to the defendant in case he is unable to employ them. If the court calls upon an attorney to defend the accused, who is unable to employ one for himself, the attorney must sit down and defend him and do it for nothing unless the state provides a compensation, but I think that every state in the union has made such a provision.

130 Ind. 265

36 Wis. 474

### IV-To be confronted by witnesses:

In other words, this is a constitutional right that is preserved against the disgraceful conduct as what was known in England as the Star-Chamber. This right was not recognized by the common law at all times.

3 Greenleaf s 2

This right is now guaranteed by the const'n of U.S. This guarantee effects trials only in the federal courts, but nearly every state has followed the const'n of the U.S.

2-Preliminary investigation before a coroner, grand jury or magistrate may be made in the absence of the accused. It is only when he is on trial by a jury of his peers upon the merits of the case that he is entitled to be confronted by the witnesses. But the authorities upon this subject differ.

3 Greenleaf s 11



3-The accused may waive this right. He may consent to secondary evidence.

29 Iowa 133

1 Bish. 117

The testimony of a deceased witness given upon a former trial may be read in evidence upon the theory that the accused has once met his accuser face to face.

73 Pa. St. 325

Depositions of witnesses cannot be taken without the consent of the accused. They must come before the jury or before him. In civil cases we send depositions over and out of the state.

48 Mich. 54

It is said that this rule does not apply to testimony that is purely documentary., that is evidence outside of the jurisdiction of the court may be taken by deposition, such as public records.

24 Mich. 225

4-Many states require that the names of the witnesses for the people be indorsed upon the indictment. The purpose of this is that the accused may investigate the character of the witnesses that may be against him. This rule gives more trouble than most rules in criminal trials. Some courts have held that this provision requiring the indorsing of the names of the witnesses on the indictment as purely directory.

Clarks Crim. Procedure 116

5-The people must call all witnesses to the criminal act even though they be favorable to the accused. All witnesses should be put on the stand who were present and knew anything concerning the facts of the case.

37 Mich. 4

The accused cannot be compelled to testify against himself.

1-A witness cannot be compelled to criminate himself in any civil or criminal procedure. The court determines whether the testimony might tend to criminate. Of course this privilege may be waived. One's declining to testify against himself cannot be commented on by the prosecutor.

2 Mich. 340

One turning state's evidence has waived this right and must testify fully.

10 Foster N.H. 540

11 Cushing 437

2-At the common law a defendant in criminal cases





can testify in his own behalf. That was a fundamental principle at the common law. In most states at the present time he may make a statement unsworn or may offer himself as a regular witness.

50 N.Y. 240

55 Me. 200

Where he offers himself as a witness he is subject to the ordinary rules of cross examination. The jury cannot draw unfavorable inferences from his failure to testify. By express statutory provisions it is a prejudicial error for the public prosecutor to make any comment whatsoever upon the fact that the accused does not take the witness stand upon his own behalf.

The accused is entitled to a fair trial. This is a constitutional provision. I shall point out an unfair trial.

1-The trial judge should not give an opinion in the presence of the jury on the evidence in the case or in any way prejudice the jury for or against a particular witness.

2-The prosecuting attorney must not at his opening state facts of which he has no proof or which is not competent for proof.

59 Mich. 576

64 " 706

The prosecutor has no right to take advantage of his position and urge the conviction of the accused in his personal belief except upon the evidence of the accused.

58 Mich. 324

As to when remarks of counsel are prejudicial and when not there is no fixed rule.

3-The court should exclude witnesses from the court room while they are not testifying, if asked to do so by the counsel of the accused. That is a very common practice although I do not think that it is of any practical value. A witness may be allowed to remain who is of special assistance to the prosecutor.

67 Mich. 537

#### V-MUST BE ESTABLISHED BEYOND REASONABLE DOUBT

I would liked to have talked to you on this subject, but I can only say that reasonable doubt is not a captious doubt. It is such an one as a prudent man might have in view of the circumstances of the accused. The authorities are at a variance as to whether or not the question of insanity is a burden upon the accused or upon the people. I think the weight of authority is that the public prosecutor is to satisfy the jury of the entire case including insanity beyond a reasonable doubt.

January 23-1903.



# CRIMINAL LAW

## INDEX

86

---oOo---

|                                  |      |
|----------------------------------|------|
| Abduction,                       | 42   |
| Accessaries,                     | 21   |
| Before the fact,                 | 22   |
| After the fact,                  | 22-3 |
| Accomplice,                      | 23   |
| Adultery,                        | 78   |
| Living in,                       | 78   |
| Rules of evidence,               | 80   |
| Prosecution for,                 | 80   |
| Affray,                          | 75   |
| Aggravated assaults,             | 44   |
| Arson,                           | 46   |
| Assault,                         | 42   |
| With deadly weapons,             | 45   |
| Attempt to committ crime,        | 5    |
| to do an impossible thing,       | 6    |
| Authorities on crime,            | 1    |
| <br>                             |      |
| Battery,                         | 43   |
| Bigamy & Polygamy,               | 81   |
| Bribery,                         | 73   |
| Burglary,                        | 48   |
| Voluntary drunkenness - defense, | 50   |
| The breaking,                    | 49   |
| The entry,                       | 50   |
| <br>                             |      |
| Carelessness of physician,       | 29   |
| Coercion by husband,             | 8    |
| Compounding a felony,            | 74   |
| mis-demeanor,                    | 74   |
| Compulsion to committ a crime,   | 8    |
| Conditions of criminality,       | 7    |



# C R I M I N A L   L A W

## I N D E X

87

|                                     |      |
|-------------------------------------|------|
| Cooling time,                       | 33   |
| Conclusions, ignorance of fact,     | 17   |
| Conspiracy,                         | 76   |
| merger,                             | 77   |
| Corporeal oath,                     | 71   |
| Corpus delecti,                     | 28   |
| Coverture,                          | 9    |
| Counterfeiting,                     | 68   |
| Crime, defined,                     | 4    |
| subdivided,                         | 4    |
| distinguished from a tort,          | 4    |
| solicitation,                       | 7    |
| classified,                         | 24   |
| Criminal intent,                    | 5-15 |
| mistake, ignorance of law and fact, | 16   |
| libel,                              | 45   |
| evidence, rights of accused,        | 82   |
| Curtilage,                          | 46   |
|                                     |      |
| Defend in person,                   | 82   |
| Drunkenness,                        | 14   |
| Duel,                               | 31   |
| Dwelling house,                     | 46   |
|                                     |      |
| Embezzlement,                       | 59   |
| distinguished from larceny,         | 60   |
| Embracery,                          | 73   |
| Emotional insanity,                 | 13   |
| Entry, in burglary,                 | 50   |
| Epochs in Criminal Jurisprudence,   | 2    |
| Period before Norman conquest,      | 2    |
| trial by ordeal,                    | 2    |
| trial by jury,                      | 3    |
| Escape,                             | 74   |



# C R I M I N A L   L A W

## I N D E X

88

|                               |       |
|-------------------------------|-------|
| Fair trial,                   | 35    |
| False pretenses,              | 62    |
| distinguished,                | 62    |
| ingredients,                  | 63-4  |
| Felony,                       | 24    |
| Force, kinds,                 | 39    |
| Forceable entry and detainer, | 77    |
| Forgery,                      | 66    |
| essentials,                   | 67    |
| Fornication,.                 | 79    |
|                               |       |
| "Guilty or not guilty,"       | 82    |
| Guiteau case,                 | 13    |
|                               |       |
| Homicide,                     | 28    |
| felonious,                    | 28    |
| excusable,                    | 35-6  |
| justifiable,                  | 38    |
| Habitation, defense,          | 37    |
| Hadfield case,                | 11    |
|                               |       |
| Idiot,                        | 10    |
| Insanity, classes,            | 10    |
| as a defense,                 | 12-14 |
| Insane delusions,             | 11    |
| Intents, two or more,         | 13    |
| Irresistible impulse,         | 12    |
|                               |       |
| Jury, twelve men,             | 82    |





# CRIMINAL LAW

## INDEX

89

|                         |      |
|-------------------------|------|
| Kidnapping,             | 42   |
| Kleptomania,            | 11   |
|                         |      |
| Larceny,                | 51   |
| simple,                 | 52   |
| property subject to,    | 54   |
| specific intent,        | 57   |
| Levying war,            | 25   |
| Lunatic,                | 10   |
|                         |      |
| Madman,                 | 10   |
| Malicious mischief,     | 69   |
| Manual seizure,         | 52   |
| Man's house his castle, | 36   |
| Mayhem,                 | 45   |
| Malice,                 | 20   |
| Malice aforethought,    | 30   |
| McNaughton case,        | 11   |
| Manslaughter,           | 32   |
| involuntary,            | 34-5 |
| voluntary,              | 32   |
| Mis-demeanor,           | 24   |
| Misprision of treason,  | 27   |
| Moral insanity,         | 13   |
| Motive,                 | 11   |
| Murder, defined,        | 30   |
| degrees,                | 31   |
|                         |      |
| Oath,                   | 70   |



# C R I M I N A L   L A W

## I N D E X

90

|                                  |      |
|----------------------------------|------|
| Offense against the Sovereignty, | 25   |
| Person,                          | 28   |
| Property,                        | 46   |
| Public Justice,                  | 70   |
| Public Peace,                    | 75   |
| Morals & Religion,               | 78   |
| Overmatched, one who is,         | 37   |
| Overt act,                       | 5    |
|                                  |      |
| Paramour, killing of,            | 79   |
| Parties to crime,                | 20   |
| Perjury,                         | 70   |
| requirements,                    | 71   |
| Police regulations,              | 17   |
| Preparation for crime,           | 5-6  |
| "        assault                 | 42   |
| Pressing necessity,              | 8    |
| Principal, first degree,         | 20   |
| second degree,                   | 21   |
| Prison breach,                   | 74   |
| Provocation,                     | 32   |
| Puffing one's wares,             | 65   |
| Putting in fear,                 | 39   |
|                                  |      |
| Rape,                            | 40   |
| Realty in larceny,               | 56   |
| Receiving stolen goods,          | 57   |
| recent possession of,            | 58   |
| Representation by Counsel,       | 83   |
| Right from wrong test,           | 12   |
| Robbery,                         | 38   |
| Rescue,                          | 74   |
| Retreat to the wall,             | 36   |
| Riot,                            | 75-6 |



# CRIMINAL LAW

## INDEX

91

|                                   |      |
|-----------------------------------|------|
| Route,                            | 76   |
| Sedition,                         | 27   |
| Seduction,                        | 82   |
| Solicitation to committ crime,    | 7    |
| Specific crimes,                  | 25   |
| Spring guns,                      | 19   |
| Subornation of perjury,           | 72   |
| essentials,                       | 73   |
| Suicide,                          | 31   |
| Tests of criminal responsibility, | 13   |
| Treason,                          | 24-5 |
| Trial by jury,                    | 82   |
| Unintended results,               | 18-9 |
| Unlawful assembly,                | 76   |
| Uttering false paper,             | 68   |
| Voluntary intoxication, defense,  | 14   |
| Wife's coercion                   | 8    |
| as an accessory,                  | 23   |



C R I M I N A L     L A W

# INDEX

92

Witnesses, confronted by, 83  
deceased, testimony of, 84  
not to criminate himself, 84  
turning; state's evidence, 84  
excluded from court room, 85

January 25-1903.

F I N I S .

—0—0—0—0—0—0—0—0—0—



















**D** 000 918 199 1

